

January 2005

Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections

Tara Kini

Follow this and additional works at: <https://scholarship.law.berkeley.edu/californialawreview>

Recommended Citation

Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271 (2005).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38KX4S>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections

Tara Kini[†]

INTRODUCTION

Securing the right to vote for noncitizens represents a new frontier in the modern struggle for civil rights. In the past ten years, voting rights for noncitizens has become an increasingly salient and visible political issue at the local level in communities all over the United States. Several municipalities have passed legislation granting noncitizens the right to vote at some level in local elections, several more are considering such legislation, and the issue has garnered attention from politicians, immigrant rights groups, legal scholars, and political scientists.¹ Most recently, the issue of noncitizen voting has surfaced in San Francisco, California, where voters

Copyright © 2005 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

[†] J.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2005; M.A., Stanford University, 1998; B.A., Stanford University, 1997. Special thanks to Matt Gonzalez for his inspiring political leadership on this issue, Professor Kathy Abrams for her encouragement and guidance throughout the writing process, and my colleagues at CLR for their excellent editing. All errors are my own.

1. Municipalities that have passed legislation enfranchising noncitizens include six Maryland municipalities and Chicago, Illinois. Cambridge and Amherst, Massachusetts have also passed legislation granting noncitizens voting rights in local elections, but state enabling legislation is required for implementation. New York City permitted noncitizen parents to vote in local school board elections from 1968 until 2002, when the school system underwent massive reorganization and the city's thirty-two local school boards were eliminated. Municipalities considering legislation to enfranchise noncitizens in local elections include New York City, Washington, D.C., and San Francisco. Several other places have at least entertained the idea, including the states of Texas and Connecticut and the cities of Los Angeles and San Bernardino, California. It is not within the scope of this Comment to provide an exhaustive overview of the current status of the noncitizen voting rights movement in various communities across the nation. For such a summary, see The Immigrant Voting Project, at <http://www.immigrantvoting.org/> (last modified Aug. 19, 2004). See also Ronald Hayduk, Noncitizen Voting: Expanding the Franchise in the U.S. 11, 16 (2003) (paper prepared for delivery at the annual meeting of the American Political Science Association, Aug. 28-31, 2003) (on file with author).

will decide on November 2, 2004 whether to allow noncitizen parents to vote in local school elections.²

For many Americans, the idea of noncitizens voting provokes a sense of outrage—an instinctive reaction that this is “just plain wrong.” For them, the right to vote is what distinguishes a citizen from a noncitizen. It is an important part of what it means to be “American.” If noncitizens can vote, many question what citizenship really signifies.

Given such strong, visceral reactions to the idea, the struggle to secure the franchise for noncitizens will no doubt be a long one. However, it is instructive to remember that many Americans reacted to the idea of women voting and blacks voting with a similar sense of outrage, yet public sentiment changed over time. A comparable transformation of the public consciousness is possible on the issue of noncitizen voting rights.

To influence public opinion, proponents of noncitizen voting rights might emphasize that the phrase “government by the people” has little resonance when an increasing percentage of the population, particularly in states like California with large immigrant populations, has no voice in the political process. At a time when more than one in ten U.S. residents is an immigrant (the number rises to more than one in four in California), extending voting rights to noncitizens strengthens democracy in America.³ Noncitizen voting in local elections promotes civic participation and citizenship because it gives noncitizens a stake in their communities and a sense that they can make a difference. Exposure to the benefits of civic participation at the local level encourages noncitizens to naturalize so that they can then also participate in state and federal elections.

The success of the noncitizen voting rights movement depends on the ability to change the mainstream American electorate’s perception of this idea as “radical.” Noncitizen suffrage is likely to gain political momentum if proponents introduce changes incrementally and frame them in a politically palatable manner. Thus, politicians and activists will need to use different strategies to win the support of progressive, liberal, and conservative voters.

This Comment sets out the San Francisco ballot measure as a model of an incremental step forward in the movement to secure voting rights for noncitizens. Part I presents the San Francisco proposal and its precursors,

2. As this Comment goes to the publisher, the results of the November 2, 2004 election are now known. Proposition F, San Francisco’s recent noncitizen voting initiative, was narrowly defeated by a margin of 49% to 51%. City and County of San Francisco Department of Elections, Consolidated General Election, Election Results, November 2, 2004, <http://sfgov.org/site/uploadedfiles/election/results.htm> (Nov. 22, 2004). For commentary on the results of the Prop. F election, see Felicia Mello, *Immigrant Voting Measure Defeated in San Francisco*, UC Berkeley Graduate School of Journalism, Nov. 2, 2004, <http://journalism.berkeley.edu/projects/election2004/archives/2004/11/proposition.wou.html>.

3. U.S. Census Bureau, 2000 Census, <http://quickfacts.census.gov> (last visited Sept. 5, 2004).

drawing on lessons from past failures and examining how the noncitizen voting rights movement might succeed in San Francisco. Part II provides an overview of the legal obstacles to noncitizen voting rights. It briefly addresses the federal constitutional challenges, which do not present a major hurdle. Then, it discusses challenges to noncitizen voting rights under California state law and outlines a number of strategies for overcoming them, including a strong “home rule” rationale.

Ultimately, though, the key to noncitizen voting rights rests not in the courts, but with the people. Thus, Part III presents two sets of arguments for promoting this idea to the electorate, one designed to sway the liberal or progressive voter and the other designed to pierce the anti-immigrant armor of conservatives. By focusing on San Francisco as a case study for how to promote the idea of noncitizen voting rights, this Comment seeks to present a framework that other localities can adopt for bringing this issue to their electorates.

I

THE SAN FRANCISCO PROPOSAL

A. *Substance of the Proposal*

The right to vote for noncitizens was spotlighted during the 2003 mayoral campaign in San Francisco. Candidate Matt Gonzalez made voting rights for noncitizen parents a central part of his education platform,⁴ modeling his proposal on New York City’s thirty-year practice of allowing noncitizen parents to vote in local school board elections.⁵ Like the New York City plan, Gonzalez’s did not distinguish between documented and undocumented immigrants.⁶ As Gonzalez lost to fellow supervisor Gavin

4. Matt Gonzalez for Mayor of San Francisco, Gonzalez Releases Education Platform with Endorsements From School Board Vice President Eric Mar, and Members Sarah Lipson and Mark Sanchez, at <http://www.mattgonzalez.com/article.php?id=137> (Nov. 11, 2003).

5. New York Education Law, article 52A, section 2590-c provided for voting in New York City’s community school district system, comprised of thirty-two community school boards. Until the reorganization of the New York City school system under Mayor Bloomberg, ratified by the State Legislature in June 2002, the law provided that every parent of a child attending any public school in the community school district “who is a citizen of the state, a resident of the city of New York for at least thirty days and at least eighteen years of age shall be eligible to vote” in elections for members of the community school board, provided they have not been convicted of a felony or engaged in voting fraud. N.Y. EDUC. LAW § 2590-c (McKinney 2001). Section 2590-c also provided that parents shall be able to register to vote at the same time as they register their child for the school “to achieve the registration of the maximum number of parents possible.” The law required written notice to parents once a year notifying them of their right to vote and allowing them to register by mail. For a discussion of the elimination of the thirty-two community school boards, see Catherine Gewertz, *N.Y.C. Mayor Gains Control Over Schools*, EDUC. WEEK, June 19, 2002, <http://www.edweek.org/ew/newstory.cfm?slug=41nyc.h21> and Elissa Gootman, *Schedule Set for Replacing School Boards*, N.Y. TIMES, Jan. 15, 2004, at B2.

6. Matt Gonzalez, *Giving Noncitizens Access to the Voting Booth*, S.F. CHRON., July 20, 2004, at B9.

Newsom in the December 2003 mayoral runoff election, winning 47% of the vote to Newsom's 52.6%, he is now pursuing his agenda from his current position as president of the San Francisco Board of Supervisors.⁷

On May 18, 2004, Gonzalez introduced a ballot initiative that would allow noncitizens with children enrolled in San Francisco public schools to cast votes in school board elections.⁸ Two months later, the San Francisco Board of Supervisors voted 9-2 to place the measure on the November ballot.⁹ If approved by a majority of the electorate, the initiative would amend the language in the city charter¹⁰ regarding voter qualifications to permit both documented and undocumented noncitizen parents to vote in San Francisco school board elections.¹¹ The proposed charter amendment would take effect in 2006, with a four-year sunset clause requiring the Board of Supervisors to affirmatively vote to continue the practice.¹²

Based on sheer numbers, Gonzalez's proposal would have a significant impact on San Francisco school board elections.¹³ San Francisco is a city of immigrants. Thirty-seven percent of the city's population was not born in the United States; 16%, or 122,000, are noncitizens. The vast majority of these immigrants hail from Asia (61%) and Latin America (21%).¹⁴ These immigrants have a strong interest in the public school system in San Francisco. San Francisco follows the national trend whereby immigrant populations are disproportionately represented in the public school system because immigrants tend to be young relative to the general

7. City and County of San Francisco Department of Elections, City and County of San Francisco Municipal Run-Off Election Current Results December 9, 2003, http://www.sfgov.org/sitc/election_index.asp?id=19802 (Dec. 15, 2003).

8. Adriel Hampton, *School Board Choice: Gonzalez Wants Immigrant Parents To Have Say in Votes*, S.F. EXAMINER, May 18, 2004, http://www.examiner.com/article/index.cfm/i/051804n_schoolboard.

9. Jo Stanley, *School-vote Issue Hits Ballot*, S.F. EXAMINER, July 21, 2004, at 5.

10. The San Francisco City and County charter currently defines a "voter" as "an elector who is registered in accordance with the provisions of state law." SAN FRANCISCO CITY CHARTER art. XVII. Thus, at present, to qualify as a voter in San Francisco one must be a United States citizen eighteen years of age and a resident of San Francisco, California. CAL. CONST. art. II, § 2; CAL. ELEC. CODE § 321 (West 2003). The California Elections Code also specifies that one must not be in prison or on parole for the conviction of a felony. CAL. ELEC. CODE § 2101 (West 2003).

San Francisco's voter eligibility requirements can be changed only by amending the city charter. The San Francisco Board of Supervisors can propose an amendment and put it before the voters, or the voters themselves may propose an amendment through a petition signed by 10% of the registered voters of the city and county. CAL. ELEC. CODE § 9255 (West 2003).

11. City and County of San Francisco Voter Information Pamphlet for November 2, 2004 General Election, Legal Text of Proposition F, at 107, http://web.sfgov.org/site/uploadedfiles/election/Docs/VIP_Nov04.pdf.

12. Hampton, *supra* note 8; Katia Hetter, *School Board Vote for Noncitizen Parents Endorsed*, S.F. CHRON., Aug. 20, 2004, at B4.

13. Of course, any effects on elections would also depend on how noncitizen voters take advantage of their new rights, in terms of voter registration, voter turnout, and voter choice.

14. U.S. Census Bureau, Profile of General Demographic Characteristics: 2000, <http://census.abag.ca.gov/counties/SanFranciscoCounty.pdf> (last modified Oct. 1, 2003).

population and unable to afford private schools.¹⁵ Thirty percent of all San Francisco public school students are designated as English Language Learners, one indication of the size of the immigrant population in San Francisco public schools.¹⁶ In response to a similar plan raised in 1996 by then-Supervisor Mabel Teng, the San Francisco Registrar of Voters estimated that granting voting rights to noncitizen parents in school board elections would increase the number of voters by as many as 50,000 voters.¹⁷

B. Origins of the Current Debate: Failed Past Proposals for Noncitizen Voting Rights in San Francisco

The idea of granting voting rights to noncitizens is not a new one in San Francisco. In February 1996, Supervisor Mabel Teng sponsored a proposal to allow noncitizen parents to vote in school board elections and noncitizen community college students to vote for City College Trustees, provided that the voters were legal permanent residents (LPRs, or Green-Card holders).¹⁸ State Senator Quentin Kopp denounced her plan as “lunacy,”¹⁹ and Secretary of State Bill Jones said there was “only a chance in a million that the courts will find her proposal constitutional.”²⁰ It apparently disappeared into the black hole of the city attorney’s office during a period of “research.”²¹ Given other developments within the Board of Supervisors that year, including the move to district rather than at-large elections and the passage of “safety zone” legislation protecting immigrants in San Francisco from effects of the 1996 welfare reform act,²² it is not surprising that Teng’s politically unpopular proposal withered away.

Two months later, a Bay Area group known as the Immigrant Rights Movement submitted a ballot initiative that would have allowed documented and undocumented immigrants to vote in all of San Francisco’s citywide elections.²³ The city attorney’s office reacted to this proposal, which was far broader than Teng’s, by challenging it in court before supporters had even gathered enough signatures to qualify for the ballot. A

15. April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 181 (1996).

16. S.F.U.S.D. School Profiles 2003-2004 (Fall 2003), San Francisco Unified School District Summary, at <http://orb.sfusd.edu/profile/prfl-100.htm> (last modified May 6, 2004).

17. Diana Walsh, *Ballot Plan Would Let Noncitizens Vote in S.F.*, S.F. EXAMINER, Apr. 23, 1996, at A1.

18. William Carlsen, *Noncitizen Vote Plan Assailed*, S.F. CHRON., Feb. 7, 1996, at A13.

19. *Id.*

20. Walsh, *supra* note 17.

21. *Id.*

22. See Proposition G, Elections of Supervisors, District Elections (1996), <http://sfpl4.sfpl.org/librarylocations/main/gic/sfbalot09.idc?id=1577> (last modified Oct. 4, 2004); see also *Our Schizoid Supervisors*, S.F. CHRON., Dec. 11, 1996, at A22.

23. Walsh, *supra* note 17.

San Francisco Superior Court judge ruled against the proposed ballot measure, holding that a change in voting rights requires an amendment to the state constitution.²⁴

C. *Why These Proposals Failed, and What It Might Take to Succeed*

In devising a new strategy for the movement, advocates for noncitizen voting rights look to earlier San Francisco efforts to try to understand why these earlier campaigns failed. One thing that the advocates point to as a potential cause of their failure is that the Teng and Immigrant Rights Movement proposals lacked broad-based support from an organized and informed coalition of local immigrant rights organizations representing the immigrant Mexican, Central American, and Chinese communities in San Francisco.²⁵ Thus, most residents of San Francisco, both citizens and non-citizens, were not aware of the issue of noncitizen voting because each proposal lacked sufficient community organizing around the issue. Further compounding the problem was that the Immigrant Rights Movement proposal was introduced too quickly after the failure of the Teng proposal and was too radical in that it extended voting rights to *all* noncitizens in *all* local elections.²⁶

Learning from previous failed attempts to achieve noncitizen voting rights in San Francisco and drawing lessons from examples of successful campaigns in places such as Takoma Park, Maryland and Amherst and Cambridge, Massachusetts, advocates of noncitizen voting have identified several characteristics that may serve as predictors of success for the current San Francisco proposal. First, these communities had experienced an influx of immigrants.²⁷ Prior to passing noncitizen voting legislation, both Takoma Park and Cambridge had previously passed legislation declaring themselves a sanctuary for refugees, particularly those from El Salvador, Guatemala, and Nicaragua.²⁸ Almost 15% of Cambridge's residents are noncitizens, and over 20% are foreign born.²⁹ This influx raised the awareness of immigrant issues in the local community and enabled the mobilization of immigrants into a political constituency. Second, local organizations, especially those nonprofits working with the immigrant community, engaged in effective grassroots organizing, coalition building,

24. *Ruling Ends Bid to Allow Voting by Noncitizens*, S.F. CHRON., May 11, 1996, at A13, <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1996/05/11/MN22271.DTL> (last visited Oct. 5, 2004).

25. Telephone Interview with Kathy Coll, activist in the movement for noncitizen voting rights in Cambridge, Mass. (Nov. 25, 2003).

26. Interview with Kathy Coll, *supra* note 25.

27. Hayduk, *supra* note 1, at 11, 16.

28. *Id.* at 17.

29. *Id.*

and lobbying.³⁰ In Cambridge, for example, the campaign for noncitizen voting rights grew out of work by immigrants' rights groups to protect affordable housing.³¹ Third, key leaders in the local community supported noncitizen voting rights, giving the issue a high profile and ensuring that it would become a visible one in the community.³² In Amherst, this key leader was Vladimir Morales, a native of Puerto Rico, a school committee member since 1985, and a member of Town Assembly.³³ Fourth, voting rights for noncitizens were phased in gradually, rather than immediately, eventually extending to all noncitizens in all local elections. Cambridge, for example, first approved voting rights for documented noncitizens in school elections in 1999 and then extended the franchise to all documented and undocumented noncitizens for all local elections in 2003.³⁴ Finally, these communities possessed a liberal Democratic majority that was willing to support progressive, rights-oriented legislation.³⁵

Given these predictors of success, San Francisco is fertile ground for noncitizen voting rights legislation. The city has an extremely large immigrant population, organized through a wide variety of nonprofits ranging from La Raza Centro Legal to Chinese for Affirmative Action.³⁶ Matt Gonzalez, who lost in the mayoral race but remains president of the San Francisco Board of Supervisors, has acted as a key leader in the movement, bringing the issue before the Board of Supervisors and championing it in the press.³⁷ As he only narrowly lost the mayoral election and still retains a strong base of support among the city's progressive voters, attaching his name to the ballot measure carries great weight. In addition, San Francisco is a heavily Democratic city with a long history of supporting civil rights, most notably those of gays and lesbians. Voting rights for noncitizens is consistent with the city's progressive political leanings.

Moreover, leaders of the current movement have learned from the experience of 1996 and taken steps to create a more broad-based coalition. Bringing together the Latino and Chinese immigrant communities in San Francisco, a coalition calling itself A Voice for All Parents has formed to lead the campaign in support of the San Francisco ballot measure, known as Proposition F, for the November 2004 election.³⁸ Proposition F received

30. *Id.* at 16; Interview with Kathy Coll, *supra* note 25.

31. Hayduk, *supra* note 1, at 16.

32. Interview with Kathy Coll, *supra* note 25.

33. Hayduk, *supra* note 1, at 17.

34. *Id.* at 18.

35. *Id.* at 17.

36. *See, e.g.*, La Raza Centro Legal, at <http://www.lrc1.org> (last visited Sept. 5, 2004); Chinese for Affirmative Action, at <http://www.caasf.org> (last visited Sept. 5, 2004).

37. *See* discussion *supra* Part I.A; *see also* Matt Gonzalez, *Giving Noncitizens Access to the Voting Booth*, S.F. CHRON., July 20, 2004, at B9.

38. *See* A Voice for All Parents, at <http://www.voice4parents.com/01/index.php> (last visited Sept. 26, 2004).

numerous endorsements from a wide array of political leaders, political organizations, and community groups.³⁹ Having learned from the 1996 failures, the current campaign for noncitizen voting rights in San Francisco is certainly better positioned to succeed.

II

LEGAL OBSTACLES TO NONCITIZEN VOTING

If San Francisco voters pass Proposition F, the ballot measure that would permit noncitizens to vote in school board elections, their decision may face legal challenges based on both federal and state constitutional law. As legal scholar Jamin Raskin has indicated in his extensive constitutional analysis, noncitizen voting is likely to survive a federal constitutional challenge.⁴⁰ A state constitutional challenge, on the other hand, presents more difficulty. However, if noncitizen voting gains widespread political support, state constitutional challenges are surmountable. Ultimately, the fight for noncitizen voting rights will likely prove more contentious in the political arena than in the legal one. Perhaps this is why those communities that have extended the franchise to noncitizens have not faced legal challenges.

A. Federal Constitutional Challenges

For the mainstream American electorate, the very concept of noncitizen voting sparks the reaction that it must violate the Constitution because only citizens have the right to vote. However, a close examination of the Constitution and Supreme Court precedent on this issue suggests that any federal constitutional challenge to noncitizen voting would likely fail.

First, although the Constitution explicitly makes citizenship a prerequisite for some forms of political participation, it does not state that one must be a citizen to vote in federal elections. The Constitution states that presidents must be natural-born citizens, senators must be citizens for nine years, and representatives must be citizens for seven years.⁴¹ With regard to citizenship and voting, however, Article I, section two borrows from state voter qualifications to define the federal electorate, stating that "Electors in each State shall have the Qualifications requisite for Electors

39. Endorsers include the San Francisco Democratic Party, the San Francisco Green Party, the San Francisco Labor Council, the Alice B. Toklas LGBT Democratic Club, the Reverend Jesse Jackson, State Assemblymembers Leland Yee and Mark Leno, and nine of the eleven San Francisco Supervisors. For a more complete list of Proposition F endorsements, see the Voice for All Parents website, at <http://www.voice4parents.com/01/modules.php?op=modload&name=News&file=index&catid=&topic=5> (last visited Sept. 26, 2004).

40. Jamin B. Raskin, *Legal Aliens. Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1431 (1993).

41. U.S. CONST. art. II, § 1; art. I, §§ 2, 3.

of the most numerous Branch of the State Legislature."⁴² In other words, during earlier periods of our nation's history, if the state permitted noncitizens to vote at the state level, the federal government, according to the Constitution, permitted them to vote in national elections for representatives, senators, and presidents as well.⁴³ Thus, the Constitution's electoral framework suggests that the Framers made a conscious choice to require citizenship for election to federal office but not for membership in the general electorate.⁴⁴

Though the Supreme Court has never directly addressed the issue of noncitizen voting, it has interpreted the Constitution to explicitly endorse the practice numerous times throughout its history. In 1874, the Court supported the concept of noncitizen voting in dicta of *Minor v. Happersett*, even though it ultimately upheld a Missouri state law denying women the right to vote.⁴⁵ The Court declared:

[C]itizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.⁴⁶

Thus, the court noted that not all citizens were voters and, conversely, not all voters were citizens.

In 1904, the Court in *Pope v. Williams* restated the *Happersett* dicta, noting that "[t]he State might provide that persons of foreign birth could vote without being naturalized."⁴⁷ Most recently, in its 1973 decision in *Sugarman v. Dougall*, in which the Court struck down a New York law excluding noncitizens from applying for state competitive civil service positions, the Court noted that "citizenship is a *permissible* criterion for limiting [voting] rights."⁴⁸ Implicitly, then, the Court suggested that citizenship is not *required* for voting rights.⁴⁹ Should a state decide that enfranchising noncitizens enriches the basic conception of the political community, Supreme Court precedent does not stand in the way.

Though the constitutional provisions governing elections do not bar noncitizen voting, other parts of the Constitution stand as potential obstacles. In his seminal article on alien suffrage, Jamin Raskin addresses the

42. U.S. CONST. art. I, § 2.

43. Raskin, *supra* note 40, at 1420.

44. *Id.* at 1420-21.

45. 88 U.S. 162 (1874).

46. *Id.* at 177.

47. 193 U.S. 621, 632-33 (1904).

48. 413 U.S. 634, 649 (1973) (emphasis added).

49. Raskin, *supra* note 40, at 1419.

various possible constitutional challenges to noncitizen voting: the Guaranty clause, the "one person, one vote" line of jurisprudence, the suffrage amendments, and the naturalization clause. Raskin then concludes that none of these bases presents a serious constitutional threat to noncitizen voting.⁵⁰

The Constitution "guarantee[s] to every State in this Union a Republican Form of Government."⁵¹ Arguably, based on the claim that noncitizens should not have a say in choosing government representatives, noncitizen voting may conflict with republican theory. However, the Supreme Court has long held the position that the republicanism of a system of state government is a non-justiciable political question.⁵² It is unlikely that the Court would depart from this line of precedent on the issue of noncitizen voting and federalism, especially considering that it is a highly controversial political question that the Court will likely try to avoid addressing.⁵³

Based on the assumption that noncitizens are not entitled to vote, one could argue that noncitizen voting dilutes the value of citizens' votes, in violation of the "one person, one vote" principle laid down by the Supreme Court in *Baker v. Carr*⁵⁴ and its progeny.⁵⁵ However, Raskin points out that "the Supreme Court has nowhere adopted one *citizen*-one vote as the constitutional standard."⁵⁶ Moreover, as the Court in *Wesberry v. Sanders* states, "those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was *population* which was to be the basis for the House of Representatives,"⁵⁷ not *citizens*.⁵⁸ Thus, noncitizens are counted in the decennial census and then factored numerically into congressional reapportionment.⁵⁹

The suffrage amendments present another argument against noncitizen voting as they implicitly suggest that the right to vote is confined to citizens.⁶⁰ The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth

50. *Id.* at 1421.

51. U.S. CONST. art IV, § 4.

52. *See, e.g.,* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912); Luther v. Borden, 48 U.S. 1, 47 (1849).

53. Raskin, *supra* note 40, at 1421-22.

54. 369 U.S. 186 (1962).

55. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).

56. Raskin, *supra* note 40, at 1423-24 (emphasis added) (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964), for the proposition that "one *man's* vote in a congressional election is to be worth as much as another's") (alteration in original).

57. *Wesberry*, 376 U.S. at 8-9.

58. U.S. CONST. art. I, § 2, cl. 3; Raskin, *supra* note 40, at 1424.

59. Raskin, *supra* note 40, at 1424; *cf.* John J. Miller, *Count on It*, NAT'L REV., Dec. 8, 2003, at 25 (arguing that illegal aliens should not be counted for purposes of congressional reapportionment because to do so disadvantages the Republican Party).

60. *See, e.g.,* *People v. Rodriguez*, 111 Cal. Rptr. 238, 240 (1973) (holding that limitation of franchise to citizens is not invidious discrimination against noncitizens).

Amendments state that “the right of *citizens* . . . shall not be denied or abridged” on account of race, sex, failure to pay a poll tax, or age if over eighteen.⁶¹ However, Raskin argues that this language “specifies only that states may not *exclude* any citizen from the franchise on the basis of race, not that the states may not *include* noncitizens in the franchise.”⁶² He cites persuasive legislative history from the passage of the Fifteenth Amendment to demonstrate that Congress did not want the amendment to interfere with the widespread practice of alien suffrage at the time.⁶³ Rather, Congress made a calculated decision to limit the Fifteenth Amendment to citizens only, thereby allowing discrimination against noncitizens in voting on the basis of race, especially against the Chinese, to continue.⁶⁴ It is true that the suffrage amendments seem to classify noncitizens differently from citizens in terms of the right to vote, at least in terms of the protection they provide against discrimination. While this reasoning might imply that noncitizens are not entitled to vote, it does not suggest that noncitizens are barred from voting by the language of the Constitution.

Finally, Congress’ power under Article I, section eight to “establish a uniform Rule of Naturalization” is not threatened by granting noncitizens the right to vote. The right to vote does not confer United States citizenship (just as citizenship for felons, ex-felons, and children does not confer the right to vote).⁶⁵ Moreover, granting noncitizens the right to vote will not make noncitizens any less answerable to federal immigration law; a non-citizen who can vote today may still be deported tomorrow by the Department of Homeland Security (“DHS”) for violating immigration law.⁶⁶ Nor will allowing noncitizens to vote at the local level allow them to influence federal decisions regarding immigration policy, as immigration law is determined solely by the federal government.⁶⁷

B. State Legal Challenges and Possible Responses

Given that a local initiative granting noncitizen residents of San Francisco the right to vote in local school board elections would likely survive federal constitutional challenges, the major legal obstacle to the

61. U.S. CONST. amend. XV, XIX, XXIV, XXVI (emphasis added).

62. Raskin, *supra* note 40, at 1425.

63. *Id.* at 1425-27.

64. *Id.*; see also Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court’s Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1147 (1996).

65. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (upholding, against an equal protection challenge, a California law excluding felons from voting).

66. Raskin, *supra* note 40, at 1430-31; *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893).

67. *Graham v. Richardson*, 403 U.S. 365, 377-78 (1971). For an alternative view of the scope of the Naturalization Clause, see Maltz, *supra* note 64, at 1183 (arguing that the Framers did not intend the Naturalization Clause to interfere with “states’ almost unfettered authority to define the rights and responsibilities of their inhabitants, and to classify those inhabitants as they saw fit”).

initiative's implementation lies at the state level. California state law presents three major legal hurdles to overcome. First, Article II, section two of the California Constitution states that "A United States citizen 18 years of age and resident in this state may vote." Second, California Elections Code sections 2000 and 2101 require United States citizenship as a prerequisite for voter registration.⁶⁸ Finally, California Education Code section 5390 extends the requirements of the Elections Code to local school district elections.⁶⁹

This Section of the Comment presents both a legislative route and a legal route for overcoming those provisions of California state law that appear to conflict with a local noncitizen voting initiative. While the legislative route does not look particularly promising, Article IX, section sixteen (Boards of Education Under City Charters) and Article XI, section five (the Home Rule Doctrine) of the California Constitution provide strong legal bases for a local initiative enfranchising noncitizens in local school board elections. In addition, this Section argues that Article II, section two of the California Constitution should not be interpreted as a bar to such an initiative.

1. *The Legislative Route*

As interpreted by San Francisco Superior Court Judge William Cahill in the 1996 challenge to the proposed ballot initiative in San Francisco, a local initiative granting noncitizens the right to vote in local elections would require an amendment to the California Constitution, which can be accomplished by legislative referendum or by direct initiative.⁷⁰ A legislative amendment requires a two-thirds vote in each house to approve the proposal and a majority vote for ratification.⁷¹ An amendment by direct initiative first requires a petition signed by 8% of the number of voters who

68. CAL. ELEC. CODE § 2000 (West 2003) states:

Every person who qualifies under Section 2 of Article II of the California Constitution and who complies with this code governing the registration of electors may vote at any election held within the territory within which he or she resides and the election is held.

CAL. ELEC. CODE § 2101 (West 2003) states:

A person entitled to register to vote shall be a United States citizen, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election.

(emphasis added).

69. CAL. EDUC. CODE § 5390 (West 2003) states:

In any school district or community college district election, *the qualifications of voters, the procedure to be followed by voters and precinct board members in the polling places on election day, and the equipment and supplies to be furnished each polling place shall be governed by those provisions of the Elections Code applicable to statewide elections.*

(emphasis added).

70. *In re San Francisco Immigrant Voting Rights Initiative*, No. 977874 (Cal. Super. Ct. Apr. 29, 1996).

71. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 315 (2000).

voted in the last gubernatorial election to get on the ballot and then requires a majority vote for passage.⁷²

Gaining legislative approval for a local noncitizen voting initiative will not be an easy task. In response to a recently released brief from the UCLA Chicano Studies Research Center calling for a state constitutional amendment permitting localities to decide whether or not to extend the franchise to noncitizens,⁷³ a spokesperson from Governor Schwarzenegger's office expressed the Governor's opposition to the idea.⁷⁴ Los Angeles County Supervisor Michael Antonovich referred to the contents of the brief as "asinine proposals."⁷⁵

The campaign for noncitizen voting rights in Massachusetts provides a potent illustration of the difficult road ahead. The towns of Amherst and Cambridge have both passed local laws granting the right to vote to noncitizens. However, despite the legislation, noncitizens in these towns have not yet been permitted to vote.⁷⁶ Massachusetts General Laws provide that citizenship is one of the prerequisites to voting in local elections; thus, before noncitizens can vote in Amherst and Cambridge, the state legislature must approve a home rule petition.⁷⁷ A seven-year lobbying effort on the part of activists has met with little success. The home rule petitions have withered away in the Election Laws Committee without ever making their way to a vote.⁷⁸

Despite these obstacles, activists in Massachusetts have not given up the fight. They continue to pressure members of the Election Laws Committee and their own local representatives.⁷⁹ In addition, grassroots organizers are reaching out to other municipalities, educating local communities about noncitizen voting, and raising the issue on a statewide level.⁸⁰ The Massachusetts example demonstrates the need to frame the political debate in such a way that state legislators can back a proposal permitting localities to grant noncitizens the right to vote in local elections without alienating their constituencies.

72. CAL. CONST. art. II, § 8.

73. Joaquin Avila, *Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population*, LATINO POL'Y & ISSUES BRIEF (UCLA Chicano Studies Research Center, Los Angeles, CA), Dec. 2003.

74. Troy Anderson, *Noncitizens Deserve the Right to Vote—Study*, L.A. DAILY NEWS, Dec. 11, 2003, at N1.

75. *Id.*

76. Interview with Kathy Coll, *supra* note 25.

77. Harper-Ho, *supra* note 71, at 312-13.

78. Interview with Kathy Coll, *supra* note 25.

79. *Id.*

80. *Id.*

2. *The Legal Route*

The possibility of amending the state constitution to loosen the voter qualification standards seems highly unlikely in California's current political climate. When California's current governor, Arnold Schwarzenegger, entered office, his first official act was to repeal a recent state law permitting undocumented immigrants to obtain California driver licenses.⁸¹ In the past ten years, California voters have used the state's well-developed system of direct democracy to pass a number of statewide anti-immigrant ballot initiatives. In 1994, California voters passed Proposition 187, which cut off undocumented immigrants' access to health care, education, and welfare benefits.⁸² In 1996, voters passed Proposition 209, which eliminated affirmative action in all state programs.⁸³ In 1998, voters overwhelmingly passed Proposition 227, which eliminated bilingual education in California.⁸⁴

However, if San Francisco's voters choose to extend the franchise to noncitizens in local school board elections through a ballot initiative amending the city's charter, it is likely that the initiative could withstand the inevitable legal challenges based on Article IX, section sixteen and Article XI, section five of the California Constitution. In addition, San Francisco's decision to enfranchise noncitizens in local school board elections could be upheld based on an alternative interpretation of Article II, section two. Unfortunately, equal protection arguments in support of non-citizen voting historically have been unsuccessful, and thus this last approach does not hold much promise.

a. Article IX, Section Sixteen: Boards of Education Under City Charters

Article IX, section sixteen is the provision of the California Constitution most relevant to San Francisco's proposal to enfranchise non-citizens in local school board elections. It provides:

81. Michael Finnegan & Joe Mathews, *The Going Gets Tough for Schwarzenegger*, L.A. TIMES, Dec. 5, 2003, at B1.

82. Proposition 187, *Illegal Aliens, Ineligibility for Public Services* (1994), <http://holmes.uchastings.edu/cgi-in/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK> (last visited Sept. 28, 2004). Proposition 187 was passed by 58.8% of the voters. However, most of the statute was later declared unconstitutional. See *League of United Latin Am. Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal. 1998) (unpublished); see also *Judge's Final Ruling Scraps Proposition 187*, L.A. TIMES, Sept. 14, 1999, at A27.

83. Proposition 209, *Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities* (1996), <http://holmes.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK> (last visited Sept. 28, 2004). Proposition 209 was passed by 54.6% of the voters.

84. Proposition 227, *English Language in Public Schools* (1998), <http://holmes.uchastings.edu/cgi-in/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK> (last visited Sept. 28, 2004). Proposition 227 was passed by 60.9% of the voters.

It shall be competent, in all charters framed under the authority given by Section 5 of Article XI, to provide, in addition to those provisions allowable by the Constitution, and by the laws of the state for *the manner in which*, the times at which, and the terms for which *the members of boards of education shall be elected or appointed, for their qualifications*, compensation and removal, and for the number which shall constitute any one of such boards.⁸⁵

San Francisco is a charter city.⁸⁶ In addition, the boundaries of San Francisco Unified School District coincide with the boundaries of the City of San Francisco.⁸⁷ Thus, based on the powers granted to charter cities under Article IX, section sixteen, San Francisco voters have the authority to amend their city charter to change the manner in which school board members are elected, including permitting resident noncitizens to participate in local school board elections. Article IX, section sixteen also permits charter cities to determine the qualifications of school board candidates. As a result, it even appears to permit noncitizens to be elected to the school board if the city charter were amended to allow it.

There is little case law interpreting exactly how much power Article IX, section sixteen grants to charter cities with respect to local school board elections.⁸⁸ In interpreting an analogous provision under Article XI, section five,⁸⁹ courts have rejected a narrow construction of the term “manner,” refusing to limit the term to election procedures only.⁹⁰ Thus, a broad construction of this provision is not inconsistent with prior cases. However, it is worth noting that both Article IX, section sixteen and Article XI, section five appear to be modeled on the United States Constitution’s Election Clause, which grants to the states the authority to

85. CAL. CONST. art. IX, § 16 (emphasis added).

86. A charter city is governed by its city charter, a written document approved by the electorate that operates as a “constitution” for the city. In charter cities, the city charter acts as the supreme law of the city. See CAL. CONST. art. XI, § 3(a). Under Article XI, section five of the California Constitution, charter cities have plenary power over municipal affairs, subject only to conflicting provisions in state or federal constitutions and preemptive state law on matters of statewide concern. In comparison to charter cities, “general law cities” are governed by state law only, and thus are subject to all of the general laws of the state, including those applicable to municipal affairs. Their powers are limited to those powers granted to general law cities under the California Constitution—including the police power—and those powers conferred by state law. See CAL. CONST. art. XI, § 7. Thus, charter cities have much greater powers than general law cities.

87. See Interactive Map of San Francisco Unified School District, at <http://portal.sfusd.edu> (last visited Sept. 5, 2004).

88. The only case the author found dealing directly with the issue of elections and/or appointment was *Hazzard v. Brown*, 2002 WL 863186 (Cal. Ct. App. 2002) (unpublished), in which the California Court of Appeal upheld an amendment to the Oakland city charter authorizing the mayor to appoint three members to the city’s board of education because the amendment was permitted under Article IX, section sixteen.

89. See *infra* Part II.B.2.b.

90. See *Johnson v. Bradley*, 841 P.2d 990, 998-99 (Cal. 1992) (interpreting “manner” broadly to include campaign finance reform); *Cawdrey v. Redondo Beach*, 19 Cal. Rptr. 2d. 179, 187 (1993) (interpreting “manner” broadly to include term limits reform).

prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives."⁹¹

Unlike the California state courts, federal courts have generally interpreted the Elections Clause narrowly and limited the states' authority to procedural aspects of elections. For example, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court struck down an Arkansas statute instituting term limits for the state's members of Congress.⁹² In *Schaefer v. Townsend*, the Ninth Circuit struck down a California statute that required state candidates for the House of Representatives to first establish residency and register to vote in the state before they could file nomination papers.⁹³ In both cases, the courts rejected the petitioner's broad interpretation of "manner" for a narrower interpretation encompassing only procedures. Thus, the courts interpreted the relevant state statute as imposing a substantive qualification on potential candidates for office (either lack of prior congressional service or state residency) that excludes classes of candidates from office, in violation of the Elections Clause.⁹⁴

However, both *Term Limits* and *Schaefer* addressed the qualifications of candidates, not the qualifications of voters. Moreover, although the language of the California provisions was apparently borrowed from the Elections Clause, federal interpretations of the Elections Clause do not necessarily control state court interpretations of either Article IX, section sixteen or Article XI, section five.⁹⁵ Thus, federal interpretations of the Elections Clause do not bar an alternative, broader interpretation of analogous provisions of the California Constitution by California state courts.

b. Article XI, Section Five: The Home Rule Argument

Article XI, section five of the California Constitution, known as the "home rule" provision, permits charter cities to exercise plenary power over "municipal affairs," subject only to constitutional limitations.⁹⁶ Under

91. U.S. CONST. art. 1, § 4, cl. 1.

92. 514 U.S. 779 (1995).

93. 215 F.3d 1031 (9th Cir. 2000).

94. *Term Limits*, 514 U.S. at 835; *Schaefer*, 215 F.3d at 1038.

95. See *Zerbe v. State*, 578 P.2d 597, 600-01 (Alaska 1978) (rejecting prevailing interpretation of the Federal Tort Claims Act in federal courts, even though the Alaska state law at issue was borrowed from the federal statute).

96. Article XI, section five of the California Constitution provides:

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only

the doctrine of home rule, the city charter trumps, or “supersedes,” a conflicting state law when it pertains to a municipal affair. Section five, subsection (b) lists four “core” categories that are, by definition, municipal affairs: the city police force; subgovernment of the city; conduct of city elections; and employment of municipal officers/employees, including their election or appointment. However, implicit in the home rule provision is the understanding that the state retains supremacy over matters that are not municipal affairs and are instead “statewide concerns.”⁹⁷ An understanding of this distinction between municipal affair and statewide concern is essential to any legal argument based on the home rule doctrine. For San Francisco’s charter amendment to be upheld based on the doctrine of home rule, the manner of electing school board members, including the composition of the electorate, must be deemed a municipal affair.

Home rule for local municipalities is a longstanding value in California, existing in the state constitution for over a hundred years. Its purpose is broad:

It was to prevent existing provisions of charters from being frittered away by general laws, which would repeal those provisions by implication. It was to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the State at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.⁹⁸

Though Judges Garoutte and Harrison wrote these words in 1899,⁹⁹ they are no less relevant today. Nevertheless, no clear definition of what constitutes a municipal affair and what constitutes a statewide concern has evolved over time. Whether a given activity is a municipal affair or a matter of statewide concern is determined by weighing the facts and circumstances on a case-by-case basis.¹⁰⁰

Courts use a four-part analysis to determine whether a given activity is a municipal affair or a matter of statewide concern, and, thus, whether

to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks, and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

97. Cal. Fed. Sav. & Loan Ass’n. v. City of L.A., 812 P.2d 916, 922-23 (Cal. 1991).

98. William Carey Jones, “Municipal Affairs” in the California Constitution, 1 CALIF. L. REV. 132, 134-35 (1913) (quoting *Fragley v. Phelan*, 58 P. 923, 925 (Cal. 1899)).

99. *Fragley*, 58 P. at 925 (Cal. 1899).

100. *In re Hubbard*, 396 P.2d 809, 814-15 (Cal. 1964).

the home rule doctrine shields it from the state.¹⁰¹ First, does an actual conflict with state law exist? If there is no conflict between the charter city enactment and a state law, then there is no need for a court to determine whether the issue is a municipal affair or a statewide concern.¹⁰² Second, does the given activity “implicate” a municipal affair? Third, does the conflicting state law address a matter of statewide concern?¹⁰³ Fourth, is the conflicting state law “reasonably related” and “narrowly tailored” to address the statewide concern?¹⁰⁴ Applying this four-part analysis to San Francisco’s proposed charter amendment allowing noncitizens to vote in school board elections suggests that the amendment would have a strong legal foundation. Thus, under the home rule doctrine, San Francisco’s local policy regarding voter qualifications for school board elections would supersede the conflicting state laws.

First, there is no question that San Francisco’s proposed policy conflicts with state law. California Elections Code section 2101 requires citizenship as a prerequisite for voter registration, and Article II, section two of the California Constitution states the same requirement, albeit in slightly less forceful discretionary language. Elections Code section 32I also defines an elector as a United States citizen. In contrast, San Francisco’s proposed policy would eliminate citizenship as a requirement for voting in local school board elections. It should be noted that Education Code section 5390, which requires that voters in school board elections meet the qualifications for voters outlined in the Elections Code, does not represent a conflict with state law, as Education Code section 5301¹⁰⁵ provides an exception for charter cities.

Second, San Francisco’s proposed policy implicates a municipal affair when viewed in light of the text of Article XI, section five, subsection (b), as well as public policy. A straightforward argument exists that, under Article XI, section five, subsection (b), the election of school board members falls under at least one of the “core categories”: the “conduct of city elections” or the power to regulate the “manner” of electing “municipal officers.” Where a charter city has exercised its power under Article IX, section sixteen and provided for the election of school board members in

101. *Johnson v. Bradley*, 841 P.2d 990, 996 (Cal. 1992); *Cal. Fed. Sav. & Loan Ass’n.*, 812 P.2d at 925.

102. *Cal. Fed. Sav. & Loan Ass’n.*, 812 P.2d at 925.

103. *Johnson*, 841 P.2d at 996.

104. *Id.*

105. CAL. EDUC. CODE § 5301 (West 2003) provides that:

The provisions of this chapter shall apply to all district elections, except as otherwise provided by law, or as otherwise provided in the charter of any city or city and county in the matters concerning which the provisions of such charters are afforded controlling force and effect by the Constitution or laws of the state.

its city charter, school board members are considered municipal officers.¹⁰⁶ Moreover, at least two home rule cases firmly support the right of a charter city to set its own rules with respect to local elections, finding the local election practice at issue a strictly municipal affair.¹⁰⁷

A more policy-based argument suggests that a charter city's decision to allow noncitizens to vote in local school board elections is a municipal affair. Legal scholar Sho Sato argues that matters related to government "structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair."¹⁰⁸ Based on this theory, San Francisco's policy would qualify as a municipal affair because it seeks to make local school board members in San Francisco more responsive to their constituency and more effective at meeting the needs of the district's significant portion of immigrant students. The court relied on a similar rationale in *Cawdrey v. Redondo Beach*, upholding the city's imposition of term limits because they made elected officials more responsive to their constituents.¹⁰⁹

Other arguments also support a finding that qualifications for school board electors implicate a municipal affair. Decisions by the elected members of the school board affect only San Francisco Unified School District, which provides K-12 educational services for the City of San Francisco. The San Francisco Board of Education has no broader authority over educational policy in California, and once elected, board members must make decisions in accordance with state law.

Also, courts tend to label a local decision as a municipal affair when there are significant local interests that differ from one locality to another.¹¹⁰ In California, the size of the immigrant and immigrant student population vary widely throughout the state, from municipality to municipality. In twelve California cities, noncitizens comprise a majority of the adult population, making treatment of noncitizens a particularly salient issue for these communities.¹¹¹ Municipalities should have the authority to

106. See *City of Oakland v. Oakland Unified Sch. Dist.*, 191 P.2d 1001, 1003-04 (Cal. 1956) (holding that school board members were municipal officers and thus the city was responsible for covering the costs of school board elections); *Becker v. Council of Albany*, 118 P.2d 924, 925-26 (Cal. 1941) (holding that, for purposes of election matters, school board members were municipal officers, and were, therefore, subject to recall under the city charter).

107. See *Cawdrey v. Redondo Beach*, 19 Cal. Rptr. 2d. 179 (1993) (upholding a city charter provision imposing term limitations on city council members, notwithstanding the absence of such limitations in state provisions governing candidate qualifications); *Mackey v. Thiel*, 68 Cal. Rptr. 717 (1968) (upholding a city's non-compliance with a state regulation mandating written disclosure of each candidate's qualifications).

108. Sho Sato, "Municipal Affairs" in *California*, 60 CALIF. L. REV. 1055, 1077 (1972).

109. 19 Cal. Rptr. 2d. at 187-88.

110. See, e.g., *Fisher v. City of Berkeley*, 693 P.2d 261, 311-12 (1984) (holding that rent withholding was not exclusively a matter of state concern because, *inter alia*, housing inventory and shortage vary widely from one locality to another).

111. See *Avila*, *supra* note 73, at tbl. 1 (citing the 2000 U.S. Census).

respond to the particular demographics they face in a way that addresses local policy concerns, including education.

Though San Francisco's proposal to enfranchise noncitizens in local school board elections implicates a municipal affair, the conflicting state laws simultaneously address matters of statewide concern: the third prong of the home rule analysis. Article II, section two and Elections Code section 2101 are arguably designed to address the state's interest in defining the scope of the political community, including the decision to exclude noncitizens from the franchise.¹¹² The state also has an interest in maintaining uniformity within election laws and preventing vote fraud.¹¹³ Permitting noncitizens to vote in school board elections might lead to illegal voting in statewide elections,¹¹⁴ if noncitizens were mistakenly registered for state election, were given the wrong ballot on election day, or if voter registration lists for local and state elections were mistakenly combined.

In the case of San Francisco's proposal to enfranchise noncitizens in local school board elections, the crux of the home rule argument will likely rest on the fourth prong. *Johnson v. Bradley* set the standard that a conflicting state statute must be (1) "reasonably related" to the resolution of the statewide concern, and (2) "narrowly tailored" to limit incursion into legitimate municipal interests.¹¹⁵ Only if the conflicting state statute meets this final test does it trump the local law pertaining to a municipal affair.¹¹⁶

Courts have not widely applied the final prong of the home rule doctrine. *Johnson v. Bradley* involved a challenge to a Los Angeles campaign finance reform law which imposed campaign spending limits on candidates while also providing them with public financing for their campaigns.¹¹⁷ Two state assemblymen challenged the Los Angeles measure on the theory that it conflicted with a state law prohibiting public financing of campaigns. In upholding the Los Angeles law, the court did not even reach the question of whether the state statute was "narrowly tailored" because it concluded that the state statute was not "reasonably related" to the resolution of a statewide concern.¹¹⁸ The *Johnson* court held that maintaining "the integrity of the electoral process" was a statewide concern, but it found that a state law prohibiting any candidate from accepting public funds was not reasonably related to further this concern because such a result would

112. *People v. Rodriguez*, 111 Cal. Rptr. 238, 239-40 (1973) (holding that the state was not required to extend the right to vote to permanent resident noncitizens).

113. See *Johnson v. Bradley*, 841 P.2d 990, 1003 (Cal. 1992) (noting that "the integrity of the electoral process" is a "legitimate state concern"); see also *Rodriguez*, 111 Cal. Rptr. at 238 (reviewing prosecution of lawful permanent resident for fraudulent voter registration).

114. For a discussion of this possibility and ways to prevent it, see *infra* Part III.C.

115. 841 P.2d at 996.

116. *Id.*

117. *Id.* at 991-92.

118. *Id.* at 1004.

directly contradict the Supreme Court's decision in *Buckley v. Valeo*.¹¹⁹ Assuming that campaign spending limits "enhance the integrity of the electoral process," the *Johnson* court noted that Los Angeles could not lawfully pursue this goal without simultaneously providing for public financing of campaigns.¹²⁰ Unfortunately, the relatively simple analysis in *Johnson* is likely to be more complex when the conflicting state laws deal with voter qualifications, as there is no Supreme Court precedent directly on point.

Nevertheless, there are strong arguments in support of the conclusion that conflicting state laws are neither "reasonably related" to the statewide concern nor "narrowly tailored" enough to preempt San Francisco's local decision to extend voting rights to noncitizens in local school board elections. First, although the state may have an interest in regulating the statewide political community and may legitimately choose to exclude noncitizens, the state has little interest in regulating how a local municipality chooses to define political membership, provided that it does not engage in racial discrimination. If a municipality chooses to extend the franchise to noncitizens to make its local school board more democratic and more responsive to the city's demographics, in the spirit of home rule their decision should trump the statewide concern. A more narrowly tailored state statute might read, "A person entitled to register to vote *in state and federal elections* shall be a United States citizen . . ."

Second, to address the state concern about vote fraud, the state could narrowly tailor election law to require certain procedures that prevent noncitizens who are permitted to vote in a local school board election from voting in a statewide election. For example, the state could require cities to maintain separate voter registration lists for noncitizens (the current practice in Takoma Park, Maryland)¹²¹ or to hold school board elections separately from other elections (the practice in New York City during the thirty-year period when noncitizens could vote in local school elections).¹²²

Finally, allowing noncitizens to vote in school board elections does not affect the state concern of maintaining a system of quality public schools. The local school board would continue to implement statewide education policy. Moreover, allowing noncitizens to vote in school board elections only strengthens the perception that local school boards are legitimate, democratic institutions. While excluding one-third of the adult population from voting (the case in Los Angeles)¹²³ undermines the

119. *Id.* at 1003-04 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) in which the Supreme Court held that limits on campaign spending were unconstitutional unless a candidate agreed to abide by specified spending limits in exchange for public financing of his campaign).

120. 841 P.2d at 1004.

121. Hayduk, *supra* note 1, at 15-16.

122. Carlsen, *supra* note 18.

123. *See* Avila, *supra* note 73, at tbl. 1 (citing the 2000 U.S. Census).

legitimacy of school boards, allowing noncitizens to vote will strengthen the public perception of school boards as democratic institutions.

To summarize, the state can more narrowly tailor statutes designed to address the state's concern with maintaining uniformity in election laws and preventing vote fraud, thereby limiting incursion into legitimate municipal interests. San Francisco's proposal extending the franchise to non-citizens in local school board elections should supercede the conflicting state laws because the state laws fail the fourth prong of the home rule analysis. San Francisco has a legitimate interest in fostering a more representative, responsive local school board that will take into account the needs of its large immigrant student population when making important educational policy decisions affecting San Francisco's public schools. The home rule doctrine provides a strong legal basis for upholding San Francisco's decision to enfranchise noncitizens in school board elections, despite contradictory state laws regarding voter qualifications.

Moreover, the United States as a whole has historically placed a high value on local autonomy when it comes to schools.¹²⁴ As a nation, Americans believe that a community deserves to control how its children are educated, how much money it wants to invest in that education, and how educational decisions should be made. The United States Supreme Court has repeatedly recognized the importance of local control over public schools.¹²⁵ In *San Antonio Independent School District v. Rodriguez*, the Court reasoned that local control is valuable because it facilitates "the greatest participation by those most directly concerned" with school decision making, builds public support for public schools, and provides "opportunity for experimentation, innovation, and a healthy competition for educational excellence."¹²⁶ In *Milliken v. Bradley*, the famous Detroit desegregation case in which the Court rejected a lower court's order mandating inter-district busing, the Court stated that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."¹²⁷ Following this line of reasoning, San Francisco's local decision about who should be granted a voice in

124. THOMAS TIMAR & DAVID TYACK, EDUCATION COMMISSION OF THE STATES, *THE INVISIBLE HAND OF IDEOLOGY: PERSPECTIVES FROM THE HISTORY OF SCHOOL GOVERNANCE* (1999), <http://www.ecs.org/clearinghouse/13/55/1355.htm> (last visited Oct. 5, 2004).

125. See Richard Briffault, *The Local School District in American Law 22-26* (2003) (unpublished paper prepared for the conference, "School Board Politics," Kennedy School of Government, Harvard University) (on file with author) (noting conflict between judicial decisions recognizing local school district autonomy and school districts' formal legal status as mere political subdivisions of their states).

126. 411 U.S. 1, 50, 53 n.108 (1973) (upholding Texas's system of funding schools through local property taxes, which resulted in substantial disparities in per-pupil expenditures between school districts).

127. 418 U.S. 717, 741-42 (1974).

school governance must be respected based on principles of local autonomy.

Nevertheless, the success of the home rule rationale will likely depend on the perceived level of political support for the charter amendment among San Francisco voters and on how the courts frame the issue. The more narrowly or locally the issue is defined, the more likely a court will decide that it is a municipal affair.¹²⁸ Thus, supporters of noncitizen voting must ensure that they define an independent purpose for the proposed charter amendment, especially one that is unique to San Francisco, that differs from the purpose of the conflicting state laws.

c. Article II, Section Two: An Alternative Approach to Statutory Interpretation

Article II, section two of the California Constitution, which states that “[a] United States citizen 18 years of age and resident in this state may vote,” represents the most serious legal obstacle to noncitizen voting in local school board elections. In the only case to date directly addressing this issue, San Francisco Superior Court Judge William Cahill stayed a ballot initiative that would have granted voting rights to noncitizens in local elections because it did not have a “miniscule chance” of constitutionality.¹²⁹ He held that “[I]f a person does not satisfy any one of [the] requirements [listed in Article II, section two], that person simply cannot vote and nothing short of a California Constitutional Amendment can change this result.”¹³⁰

Although Judge Cahill stated, “Any reading of Sec. two shows that the qualifications listed therein are minimum requirements that cannot be ignored or expanded,” a more liberal interpretation of Article II, section two could have been adopted. First, Article II, section two does not explicitly forbid enfranchising noncitizens. Following the common canon of construction that a positive statement, A, does not necessarily exclude statement B, only language forbidding enfranchising noncitizens necessarily precludes extending the right to vote to noncitizens. Applying this approach to Article II, section two leads to the conclusion that this section merely sets a baseline for who, at a minimum, is included in the franchise: U.S. citizens 18 years of age and residents of California. It does not define who must be excluded. If the state, or a local municipality for purposes of local elections, chooses to extend the vote to a different group—for example, by allowing students sixteen years of age or older to vote in local

128. See, e.g., *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1015-16 (Cal. 1976) (striking down a Berkeley rent control initiative on other grounds, but finding that the initiative did not conflict with state unlawful detainer statutes).

129. *In re San Francisco Immigrant Voting Rights Initiative*, No. 977874 (Cal. Super. Ct. Apr. 29, 1996).

130. *Id.*

school board elections—it may do so.¹³¹ It may also narrow the group of people who are eligible to vote, as it does in California Elections Code section 2101 by adding the condition that one cannot be a felon. Article II, section two does not state that *only* a United States citizen may vote, and is thus not a determinative barrier to noncitizen voting in local school board elections.

Moreover, an examination of the legislative history demonstrates that the legislators and voters of California understood the difference between mandatory and permissive language, and chose the latter when they amended the portion of the California Constitution dealing with voter qualifications. In 1972, the California Senate proposed Proposition 7, which California voters overwhelmingly passed by a margin of 68% to 32%.¹³² With Proposition 7, the voters of California replaced a specific, lengthy, and mandatory statement of voter qualifications with the short, permissive statement now found in Article II, section two. The repealed provision stated:

Every native citizen of the United States of America . . . and every naturalized citizen thereof, of the age of 21 years, who shall have been a resident of the State one year . . . *shall be entitled to vote* . . . provided, further, *no alien ineligible to citizenship*, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State¹³³

The repealed version used mandatory “shall” language and then proceeded to name those classes of people who were specifically excluded from the franchise. Notably, the statute explicitly excluded from the franchise only those aliens “ineligible for citizenship,” suggesting that immigrants with LPR status who were on the citizenship “track” were entitled to vote.

Proposition 7 preserved some of the categories of exclusion from the repealed section by amending the California Constitution to also include Article II, section three (now Article II, section four). The newly adopted language stated: “The Legislature . . . shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public

131. See, e.g., *Padilla v. Allison*, 113 Cal. Rptr. 582, 583-84 (1974) (“While the states could extend the franchise to aliens, there is no *obligation* to do so.”).

132. See Proposition 7, Elections and Presidential Primary (1972), <http://holmes.uchastings.edu/cgi-in/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK> (last visited Sept. 28, 2004).

133. *Id.* (emphasis added).

money, shall exercise the privileges of an elector in this state.”¹³⁴ This language is almost identical to the repealed law, with the exception that “aliens ineligible for citizenship” and persons who cannot read or write in English are no longer excluded from voting. In its totality, then, Proposition 7 created a much more permissive legal environment for voting by noncitizens because of its elimination of noncitizens from the specific list of those ineligible to vote.

Article II, section two, as it relates to the issue of noncitizen voting, has not been widely interpreted. Two California appellate cases decided by the same panel of judges shortly after Proposition 7 was passed have held that noncitizens do not have a right to vote under the California or United States Constitutions. In *People v. Rodriguez*, LPRs brought an equal protection challenge alleging that California’s limitation of the franchise to citizens violated their equal protection and due process rights under the United States Constitution.¹³⁵ In *Padilla v. Allison*, LPRs who otherwise would have been eligible for citizenship but for the fact that they could not read or write in English, specifically challenged the constitutionality of Article II, section two (former Article II, section one).¹³⁶ In both cases, the court’s decision rested largely on recent Supreme Court precedent in *Sugarman v. Dougall*, which stated in dicta that “implicit in many of this Court’s voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.”¹³⁷ While *Rodriguez* and *Padilla* stand for the proposition that the state is not *required* to extend the vote to noncitizen LPRs, their holdings do not prevent a court from interpreting Article II, section two to permit a city to *choose* to enfranchise noncitizens in local elections.

Both the text of Article II, section two and the legislative history of Proposition 7 support the argument that San Francisco’s decision to allow noncitizens to vote in local school board elections does not violate the state constitution; moreover, precedent established in *Rodriguez* and *Padilla* can also be used to support such a conclusion. As discussed in Part III, numerous strong policy rationales also support upholding San Francisco’s proposal. In brief, if the electorate of San Francisco decides to “share their vote” with noncitizens on issues of school policy, holding their decision unconstitutional undermines democracy. Article II, section one of the California Constitution, entitled “Nature of Government,” states: “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it

134. *Id.*

135. 111 Cal. Rptr. 238, 239 (1973).

136. 113 Cal. Rptr. 582, 583 (1974).

137. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); *Rodriguez*, 111 Cal. Rptr. at 239-40; *Padilla*, 113 Cal. Rptr. at 583.

when the public good may require." Article II, section two defines those who hold the political power in the polity. In amending the San Francisco city charter to enfranchise noncitizens in school board elections, San Francisco voters would have determined that the city benefits when non-citizens are able to participate in the local decision-making process on matters of local public education. Thus, following the spirit of democracy behind Article II of the California Constitution, San Francisco's charter amendment should not be struck down as unconstitutional.

In evaluating how serious a hurdle California's Article II, section two represents, Maryland provides a useful basis for comparison. Article I, section one of the Maryland Constitution provides that "Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State . . . shall be entitled to vote . . . at all elections to be held in this State." Like California's, Maryland's constitution mentions the right to vote only with respect to citizens. This provision of the Constitution has, however, not prevented individual municipalities from amending their charters to permit noncitizens to vote in local elections. Since the early 1990s, six Maryland municipalities have amended their city charters to permit noncitizens to vote in local elections,¹³⁸ and in these six cities, non-citizens have been participating in local elections ever since. Maryland courts have long interpreted Article I, section one to apply only to state elections, not municipal ones.¹³⁹ In *Smith v. Stephan*, a Maryland court upheld the validity of a municipal election, despite the fact that it was held without any voter registration list.¹⁴⁰ The court held that municipal elections are distinguishable from state elections and thus are not limited by the state constitution's requirement regarding voter registration lists.¹⁴¹

The distinction is clearly made in the Constitution between federal and state elections on one side and municipal elections on the other. It is impossible to mistake the meaning of the terms employed. An election held for the purpose of regulating the local affairs of a town or city, under the provisions of its charter, would never be mistaken for a state election. It is sufficient to say that no

138. See Charter of Takoma Park, Maryland, art. VI, §§ 601, 603; Charter of the Town of Somerset, art. V, § 83-21; Charter of Barnesville, § 74-3; Charter of the Village of Chevy Chase, art. III, § 301; Charter of the Village of Martin's Addition, art. III, § 301; Charter of the Town of Garrett Park, art. III, § 78-20.

139. See, e.g., *Reeder v. Bd. of Supervisors*, 305 A.2d 132 (Md. 1973) (referring to Maryland Code Art. 33, § 1-1 (a)(6), which states that "'Election' means the process by which voters of the State, or any county or city thereof, vote for any party or public officer pursuant to the laws of this State or the United States, any constitution or constitutional amendment, public law, public act or proposition and unless otherwise indicated shall include all elections, primary, general, special, local, congressional, presidential, or State-wide. It does not mean any municipal election other than in Baltimore City unless otherwise specifically provided for in this article.") (alteration in original).

140. *Smith v. Stephan*, 7 A. 561, 562 (Md. 1887).

141. *Id.* at 561-62.

municipal elections except those held in the city of Baltimore are within the terms or meaning of the constitution.¹⁴²

In addition, Maryland, like California, has a strong home rule doctrine, granting municipalities the authority to amend their city charter or other local laws relating to the incorporation, organization, government, or other affairs of the municipality.¹⁴³ Because Maryland distinguishes between state and local elections, and because Maryland values the principle of home rule by municipalities in regards to local affairs, municipalities are able to enfranchise noncitizens in local elections despite a contrary provision in the state constitution.

To summarize, then, the experience of Maryland, combined with textual, legislative history, legal precedent, and policy arguments, supports a permissive interpretation of Article II, section two. A decision by San Francisco voters to enfranchise noncitizens in local school elections should thus not be considered a violation of this section of the California Constitution.

d. Equal Protection Challenges Will Likely be Ineffective

In one of the first scholarly articles to examine the issue of noncitizen voting, Gerald Rosberg argued that the Fourteenth Amendment's Equal Protection Clause entitles noncitizens to a right to vote.¹⁴⁴ According to Rosberg, courts should subject any state law denying noncitizens the right to vote to the exacting standard of strict scrutiny on two grounds: aliens are a suspect class and voting is a fundamental right.¹⁴⁵ Based on such a standard, a state law denying noncitizens the right to vote cannot withstand an equal protection challenge because, according to Rosberg, it is not narrowly tailored to serve a compelling state interest.¹⁴⁶

Despite Rosberg's confidence, challenges brought in the 1970s to the Article II citizenship requirement based on the Fourteenth Amendment's Equal Protection Clause met with little success.¹⁴⁷ Though the court in *Rodriguez* recognized that classifications based on alienage are subject to close judicial scrutiny when they impinge on social or economic rights, courts do not give the same close review to classifications based on

142. *Id.* at 562.

143. *See* MD. CONST. art. XI-E, § 3.

144. Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1104 (1977).

145. *Id.* at 1105-07.

146. *Id.* at 1115-37 (arguing that the state's interest in ensuring that voters have a sufficient stake in government affairs and the ability to vote responsibly does not provide adequate justification for excluding noncitizen legal permanent residents from the franchise).

147. *See, e.g.,* *Padilla v. Allison*, 113 Cal. Rptr. 582 (1974); *People v. Rodriguez*, 111 Cal. Rptr. 238 (1973); *see also Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977) (rejecting the claim that Colorado's citizenship requirement for voting in school board elections violated the Equal Protection Clause).

alienage that merely impinge on the political process.¹⁴⁸ When examining state classifications based on alienage, courts recognize a “political function” exception to the usual strict level of scrutiny.¹⁴⁹ Thus, a state may legitimately exclude noncitizens from voting “to preserve the basic conception of a political community” without violating the Equal Protection Clause.¹⁵⁰

Moreover, Rosberg’s original equal protection argument is fundamentally flawed because it fails to fully recognize that section two of the Fourteenth Amendment permits the states to exclude women, males under twenty-one, criminals, and noncitizens from voting.¹⁵¹ Given that the Supreme Court has interpreted section two as precluding an equal protection challenge by felons based on their exclusion from the franchise,¹⁵² it is likely that the Court would extend this reasoning to a similar challenge by noncitizens.

Adam Cox has suggested that citizen plaintiffs may have more success with an equal protection challenge than noncitizens have had.¹⁵³ Building on *Shaw v. Reno*¹⁵⁴ jurisprudence in the voting rights context, Cox argues that citizens should have standing to challenge an immigration law when that law results in a legally cognizable expressive harm.¹⁵⁵ In *Shaw*, the Supreme Court held that race-based redistricting schemes, though seemingly race-neutral, violated the equal protection rights of all members residing in the challenged district.¹⁵⁶ The Court recognized an expressive harm: “that certain districts convey the message that political identity is, or should be, predominantly racial.”¹⁵⁷ Cox concludes that when immigration

148. *Rodriguez*, 111 Cal. Rptr. at 239-40.

149. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a California law requiring peace officers to be citizens because classifications based on alienage are subject only to rational review where there is a “political function” involved).

150. *Rodriguez*, 111 Cal. Rptr. at 239-40 (citing *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

151. Raskin, *supra* note 40, at 1435-36. Section two states:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added).

152. *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).

153. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 397 (2004).

154. 509 U.S. 630 (1993).

155. Cox, *supra* note 152, at 397.

156. *Shaw*, 509 U.S. 630.

157. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1539 (2000).

laws regulate “the boundaries of the national political community” in a fashion that “express[es] a constitutionally impermissible . . . national political identity,” for example, a race-based immigration policy, “citizens should have standing to challenge [these] laws.”¹⁵⁸

By extension, then, when state or local election laws define the state or local political community to suggest that only citizens have an interest in the outcome of elections and that noncitizens do not share their political concerns, citizens suffer an expressive harm giving rise to a Fourteenth Amendment violation. Such laws assume that political identity is predominantly based on immigration status, and that by virtue of being a citizen, one’s political interests are different from those of noncitizens.

Despite this available legal avenue, citizen supporters of noncitizen voting rights should think twice about taking such an approach to securing rights. First, based on Cox’s argument, they might have standing in the courts to press their equal protection claim; however, success on the merits seems unlikely. Second, citizen supporters of noncitizen voting rights are, at least at present, a liberal crowd who should be wary of endorsing the *Shaw* decision, which places limits on the use of race-conscious redistricting schemes to overcome our country’s history of vote discrimination.

III

FRAMING THE DEBATE OVER NONCITIZEN VOTING

As Part II demonstrates, numerous legal arguments support a charter city’s decision to enfranchise noncitizens in local school elections. However, the success or failure of the noncitizen voting rights movement depends more on public opinion than the judicial outcomes of legal challenges. Can the standing electorate be convinced to broaden our definition of the political community and extend the franchise to noncitizens? The answer depends on whether the arguments put forth by advocates of noncitizen voting will sway current voters.

The San Francisco proposal provides an interesting case study of how advocates of noncitizen voting might “sell” this concept to the standing electorate. In shaping a campaign, it is essential that advocates of noncitizen voting take into account the strategy of “framing.” Through framing, proponents can present the issue of noncitizen voting using language that is most likely to resonate with particular groups.¹⁵⁹ In San Francisco, these different audiences might include the progressive, liberal, and conservative voter bases, as well as various ethnic groups and the gay community. Framing is an important tool for filtering an issue through the history, the beliefs, the language, and the cultural experiences that are most likely to

158. Cox, *supra* note 153, at 397, 403.

159. PATRICK NOVOTNY, WHERE WE LIVE, WORK AND PLAY: THE ENVIRONMENTAL JUSTICE MOVEMENT AND THE STRUGGLE FOR A NEW ENVIRONMENTALISM 8 (2000).

engender widespread sympathy and involvement.¹⁶⁰ Cognitive linguist George Lakoff emphasizes that “words are defined relative to conceptual frames . . . and if you want to evoke the right frames, you need the right words.”¹⁶¹ According to Lakoff, advocates of noncitizen voting must be proactive about creating an explicit frame, or language of public discourse, before their opponents can do so.¹⁶²

High profile supporters like Board of Supervisors President Matt Gonzalez and grassroots organizers must therefore know their audience and understand which arguments for noncitizen voting rights are likely to resonate with particular groups. Successful political campaigns target their message to the audience, adapting it and playing on their audience’s hopes, fears, and values to achieve the political goal at hand. This means that progressives from the predominantly Latino Mission District should receive a different message than conservatives from the more affluent, white neighborhood of Pacific Heights.

Part III suggests that leaders in the movement for noncitizen voting rights must develop two sets of arguments in support of their proposal to permit noncitizens to vote in local school board elections—one set to convince the city’s liberal and progressive voters, the other to target the city’s more conservative voters.

A. Winning Over the Liberal and Progressive Voter

Liberal and progressive voters are likely to be swayed by arguments that simultaneously appeal to their conscience and serve their own interests. Voters on the political left may accept noncitizen voting rights when they are educated about the history of noncitizen voting in the United States and its widespread practice in other democracies around the world. Historical and comparative arguments may succeed in convincing liberals and progressives on the merits of noncitizen voting by, in effect, shaming them into it. If voting is a right that noncitizens once had in many states, and that noncitizens have in many democracies around the world, how can the electorate now deny noncitizens that right? Moreover, the moral arguments for noncitizen voting are compelling, given how closely entwined noncitizens already are in many other areas of public life, including serving in the military and paying taxes. Extending the franchise to noncitizens may also be politically pragmatic, increasing the overall voting strength of progressives.

160. *Id.* at 7-8.

161. GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 419-20 (2002).

162. *Id.*

1. *The Historical Argument*

The history of noncitizen voting rights in the United States is a well-kept national secret. Most Americans today have no idea that during the nineteenth century, at least twenty-two states and territories permitted non-citizens to vote, and that it was not until 1926 that the last state, Arkansas, limited its voter qualifications to include only citizens.¹⁶³ Community education about the concept of noncitizen voting must, therefore, include a historical component so that voters understand that extending the vote to noncitizens merely restores a right to a group that once had it.

During the early years of the United States, notions of federalism were still developing and the concept of state "citizenship" was far stronger than national citizenship.¹⁶⁴ States decided how to define their own electorate and many chose to place greater importance on race, gender, and property than on citizenship.¹⁶⁵ For example, Vermont, Pennsylvania, and Virginia all allowed noncitizens to vote, provided, of course, that they were white men with property.¹⁶⁶ According to Jamin Raskin,

[t]o exclude aliens from voting would have given rise to the dangerous inference that U.S. citizenship was the decisive criterion for suffrage at a time when the majority of U.S. citizens, including almost all women and substantial percentages of men without property, were categorically excluded from the franchise. On the other hand, alien enfranchisement reflected the assumption that the propertied white male alien voter would be sufficiently similar to other electors so as not to threaten fundamental cultural and political norms.¹⁶⁷

Noncitizen voting was also widely accepted at the federal level, with Congress extending the vote to noncitizens in its newly created territories as a strategy to encourage immigration to the northwest territories.¹⁶⁸

Throughout our nation's history, the popularity of alien suffrage ebbed and flowed during periods of war and during periods of westward expansion and heavy immigration. Following the War of 1812, anti-foreigner sentiment ran high and most newly admitted states chose not to extend the franchise to noncitizens.¹⁶⁹ However, during the period of westward expansion in the 1840s to 1860s, new states, starting with Wisconsin, recognized a need to attract immigrants and offered voting rights to those

163. Raskin, *supra* note 40, at 1397.

164. *Id.* at 1397-98.

165. *Id.* at 1401-02.

166. *Id.* at 1400.

167. *Id.* at 1401.

168. *Id.* at 1402.

169. *Id.* at 1403-04.

inhabitants willing to declare their intent to naturalize.¹⁷⁰ Congress followed suit by extending voting rights for noncitizens in its new territories, such as Washington, Nevada, Wyoming, and Oklahoma.¹⁷¹

The Civil War was also a catalyst for noncitizen voting rights. The North relied on noncitizens to fill its ranks, with “foreign born” constituting “nearly 25 percent of the Union Army.”¹⁷² Any noncitizens who had cast a vote in the United States were subject to the draft immediately, and all males between the ages of twenty and forty-five who had declared their intention to become citizens were eligible to be drafted.¹⁷³ Following the war, it was politically difficult to deny these soldiers their right to cast a vote, and many southern states extended the vote to noncitizens.¹⁷⁴

Resistance to the heavy immigration of darker-skinned southern, central and eastern Europeans in the early 1900s, as well as xenophobic feelings arising out of World War I, led to the eradication of noncitizen voting in the early twentieth century.¹⁷⁵ As in the early 1900s, today anti-immigrant sentiment runs high in the United States. In California, Texas, and the Southwest, anti-immigration rhetoric acts as a thin shield for racism towards poor, dark-skinned immigrants from Mexico and Central America.¹⁷⁶ In addition, the terrorist attacks of September 11th provoked a widespread fear of foreigners among many Americans. Popular attitudes towards immigrants might suggest that now is not an opportune time for extending the vote to noncitizens. Today, for most Americans, it will come as a surprise to learn that noncitizen voting was a widespread political practice among the states for most of our country’s history until just eighty years ago. However, it is the very knowledge of this history—an understanding that limiting the right to vote to citizens was not part of the original conception of the Constitution, and that the practice of noncitizen voting is not a radical new concept but one that has a 150-year history in this country—that may convince voters to open their minds to the concept of noncitizen voting.

170. *Id.* at 1406-09. These were: Wisconsin (1848), Minnesota (1857), Kansas (1859), Nebraska (1867), North Dakota (1889), and South Dakota (1889).

171. *Id.* at 1407-08.

172. *Id.* at 1410.

173. *Id.* at 1413.

174. *Id.* at 1414-15 (noting that Alabama, Florida, Georgia, South Carolina, and Texas allowed noncitizens who had declared their intent to naturalize to vote).

175. *Id.* at 1415-17; Harper-Ho, *supra* note 71, at 282-83. The final states to abolish noncitizen voting were: Alabama (1901), Colorado (1902), Wisconsin (1908), Oregon (1914), Kansas (1918), Nebraska (1918), South Dakota (1918), Indiana (1921), Texas (1921), Mississippi (1924), and Arkansas (1926). Raskin, *supra* note 40, at 1416.

176. See discussion of recent California ballot propositions, *supra* Part II.B.2.

2. *The Comparative Argument*

Voting rights for noncitizens is an emerging democratic norm, suggesting that comparisons to other countries should play an important role in local debates about noncitizen voting. Twenty-two democracies (more than one in five) grant noncitizens at least some voting rights, and two others, Bolivia and Colombia, have constitutions that explicitly permit their legislatures to enfranchise noncitizens.¹⁷⁷ These extraordinary numbers indicate that voting rights for noncitizens is not a radical idea on the international level, despite each nation's individual interpretation of what those rights might entail.¹⁷⁸

The twenty-two democracies that allow noncitizen voting do so in a variety of different ways. New Zealand has the most expansive noncitizen voting rights in that it permits all resident aliens who have resided in the country for one year to vote in all elections, local and national.¹⁷⁹ Sweden, Denmark, Norway, the Netherlands, Finland, Iceland, Ireland, Hungary, Venezuela, and Belize all allow noncitizens to vote in local elections once they have resided in the country for a certain number of years.¹⁸⁰ Ireland, with the shortest residency requirement, requires noncitizens to have resided in Ireland for only six months before they are eligible to vote.¹⁸¹ In Switzerland, which has a federal system similar to that of the United States in which individual states make decisions about voter qualifications, two states (known as cantons) permit resident aliens to vote.¹⁸²

It should be noted that, in the past ten years, some countries have considered and rejected voting rights for noncitizens, including Belgium, France, Italy, Japan, and Latvia.¹⁸³ As political scientist David Earnest notes, there are a variety of hypotheses as to why some democracies have chosen to extend voting rights to noncitizens while others have rejected the idea. Variables that might explain these differences include the size and composition of immigration and "associated xenophobic backlashes"; "the

177. David C. Earnest, *Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm 1* (2003) (unpublished paper prepared for delivery at the American Political Science Association annual convention) (on file with author). These twenty-two countries are: Barbados, Belize, Canada, Chile, Denmark, Estonia, Finland, Hungary, Iceland, Ireland, Israel, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Uruguay, and Venezuela. *Id.* at 5.

178. Countries have granted vastly different forms of suffrage to noncitizens, and the scale and scope of those rights varies widely. Some countries permit only some noncitizens of a certain nationality to vote—usually corresponding to previous colonial relationships—while others permit all noncitizens to vote. Some countries permit noncitizens to vote in local elections only, while others permit noncitizens to vote in all elections, local and national. For a more detailed discussion categorizing noncitizen voting rights, see Earnest, *supra* note 177.

179. Earnest, *supra* note 177, at 13.

180. *Id.* at 11, 13.

181. *Id.* at 12.

182. *Id.* at 6.

183. *Id.* at 18.

historical and legal evolution of national conceptions of both citizenship and of voting rights"; and "evolving international norms of community-based democracy and human rights."¹⁸⁴

Developments in international law also point to noncitizen voting rights as an emerging democratic norm. The Maastricht Treaty of 1993, amended by the Amsterdam Treaty of 1997, made voting rights for non-citizens an important feature in the formation of European Union policies on justice and home affairs.¹⁸⁵ The Treaty states:

Every citizen of the Union residing in a Member state of which he is not a national shall have the right to vote and stand as a candidate at municipal elections in the Member State of which he resides, under the same conditions as nationals of that State.¹⁸⁶

The European Union serves as an example of a new conception of the right to vote. Rather than depending on one's legal status as a citizen of a particular nation, the right to vote in local elections is now dependent on one's place of residence. Thus, the right to vote has been separated from the idea of "citizenship." In addition, perhaps the definition of what it means to be a "citizen" must be expanded.¹⁸⁷

Other democracies that have enfranchised noncitizens have proven to be powerful examples to local communities in the United States considering the idea. In Cambridge, Massachusetts, the idea that "they do it in Dublin" was cited by some city council members as influencing their vote in favor of a resolution enfranchising noncitizens.¹⁸⁸ As our society continues on the path toward globalization, "in which labor and capital migrate unhindered across national borders,"¹⁸⁹ it will become increasingly difficult to argue that political and social rights should not.

184. *Id.* at 21 (quoting Raskin, *supra* note 40, at 1394).

185. *Id.* at 16.

186. Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, art. 19, O.J. (C 340) (1997), as Amended by the Treaty of Amsterdam, <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0173010078> (last visited Oct. 5, 2004).

187. Linda Bosniak has suggested that citizenship, beyond meaning mere legal status, has at least three other possible definitions: citizenship as rights, citizenship as identity, and citizenship as political activity. Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 452 (1999). Under a definition of citizenship as rights, citizens are those who enjoy the civil, political, and social rights of membership in a society. *Id.* at 463-64. Citizenship as identity speaks to citizenship's "psychological dimension, that part of citizenship that describes the affective ties of identification and solidarity that we maintain with groups of other people in the world." *Id.* at 479. Finally, under a definition of citizenship as political activity, citizens are those who are actively involved in the political community. *Id.* at 470. Thus, under this last definition, there might be "local citizens," including those who are not citizens of the nation (i.e. noncitizens), who are nevertheless active, voting members of the local political community.

188. Interview with Kathy Coll, *supra* note 25.

189. Earnest, *supra* note 177, at 22.

3. *The Moral Argument*

Ingrained in the American mind are a few core democratic norms that form part of the moral foundation of the country: no taxation without representation, government rests on the consent of the governed, and good enough to fight is good enough to vote.¹⁹⁰ Early Americans took up arms during the American Revolution in support of the principle of “no taxation without representation.” “Good enough to fight is good enough to vote” was the rallying cry for the constitutional amendment enfranchising eighteen-year-olds. Similarly, proponents of noncitizen voting rights should argue to liberal and progressive voters that Americans are guilty of hypocrisy if they deny that these core values, which are enshrined in United States history and in the United States Constitution, also apply to noncitizens.

Just as conservatives have adeptly utilized the language of morality to influence political debate, supporters of noncitizen voting should use this language to frame voting rights for noncitizens as a fundamentally moral issue.¹⁹¹ Liberal and progressive voters are likely to be persuaded by an appeal to their conscience in conjunction with a basic education about how noncitizens are already integrated into the fabric of American society. For example, noncitizens pay taxes, such as property taxes, state and federal income taxes, local sales taxes, and many others, just as citizens do. The National Research Council of the National Academy of Sciences estimates that the typical immigrant and his or her children pay \$80,000 more in taxes than they receive in local, state, and federal benefits over their lifetimes.¹⁹² Moreover, immigration laws require proof of tax payment for five years before a noncitizen can naturalize.¹⁹³ Noncitizens have also fought as soldiers in every major American war and have at times been subject to the draft.¹⁹⁴ The first combat casualty in the recent war in Iraq was a noncitizen soldier, a U.S. Marine from Guatemala.¹⁹⁵ Indeed, 37,000 noncitizens currently serve in the active duty U.S. armed forces.¹⁹⁶

Without the right to vote, noncitizens have no ability to influence the political process and to protect their interests—interests that are clearly established by the ways that they are already included in the polity. They

190. See Raskin, *supra* note 40, at 1442-45 (discussing the “classical democratic” argument in support of voting rights for noncitizens).

191. LAKOFF, *supra* note 161, at 187-89.

192. STEPHEN MOORE, NAT’L IMMIGRATION FORUM & CATO INSTITUTE, *A FISCAL PORTRAIT OF THE NEWEST AMERICANS* (1998).

193. Harper-Ho, *supra* note 71, at 295-96.

194. Raskin, *supra* note 40, at 1442 (citing Charles E. Roh, Jr. & Frank K. Upham, Comment, *The Status of Aliens Under the United States Draft Laws*, 13 HARV. INT’L L.J. 501, 501-02 (1972)).

195. Simon Crittle, *In Death, A Marine Gets His Life Wish: Profile: José Gutiérrez, the First U.S. Soldier Killed in Combat in Iraq*, TIME (Mar. 28, 2003), available at <http://www.time.com/time/world/article/0,8599,438626,00.html>.

196. Noncitizen Soldiers, Transcript, Online Newshour with Jim Lehrer, at http://www.pbs.org/newshour/bb/military/jan-june03/noncitizens_04-21.html (Apr. 21, 2003).

have no say over how their tax dollars will be spent or on foreign policy decisions that may lead us into a war they will be fighting. Their children attend public schools that their tax dollars support, yet they have no voice in choosing the elected representatives on the local school board who will run the schools. The children of noncitizens, who are very likely citizens themselves, are also left unrepresented in the political process, because their parents are denied a vote.¹⁹⁷ In sum, noncitizens are the consummate "discrete and insular minority" who lack any power to protect their political interests and are subject to discriminatory acts of government, through both representative government and the process of direct democracy.¹⁹⁸ "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,"¹⁹⁹ yet noncitizens currently lack this protection and are subject to the whims of the standing electorate.

When one looks at the demographics of California, the moral argument for noncitizen voting rights becomes even more compelling. In California, noncitizens comprise 19% of the adult population.²⁰⁰ These noncitizens work and purchase goods in the local economy, contribute to government revenues, participate in a wide variety of community affairs, and yet are completely shut out of the political process. Moreover, California has at least eighty-five cities where noncitizens comprise over 25% of the city's total adult population, and, even more striking, twelve municipalities where noncitizens comprise a majority of adults.²⁰¹ In Los Angeles, the largest city in California, noncitizen adults are one-third of the city's adult population.²⁰² A recently released brief from the UCLA Chicano Studies Research Center likened the systematic exclusion of noncitizens from the political process to "political apartheid."²⁰³ California now has a semi-permanent class of outsiders who reside and labor in our local communities, cleaning our houses, sewing our clothes, tending our

197. See Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463 (1998) (arguing that parents should be allowed to "represent" their children by voting as their proxies, to include children in the balance of political power and ensure their interests are adequately represented).

198. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938); see also *Graham v. Richardson*, 403 U.S. 365, 371-73 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (quoting *Carolene Products*, 304 U.S. at 152-53)). Scholars disagree about the extent to which noncitizens constitute a "discrete and insular" minority. Compare T. Alexander Aleinikoff, *Citizens, Aliens, and the Constitution*, 7 CONST. COMMENT. 9, 24 n. 58 (1990) with JOHN HART ELY, *DEMOCRACY AND DISTRUST* 161-62 (1980).

199. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

200. See Avila, *supra* note 73, at tbl. 1 (citing the 2000 U.S. Census).

201. *Id.*

202. *Id.*

203. *Id.*

gardens, washing dishes in our restaurants, and caring for our children. Yet, along with noncitizen trained professionals and students, they are excluded from the political process without any meaningful way to petition for a redress of grievances.

4. *The Political Pragmatism Argument*

A more pragmatic argument for noncitizen voting rights is that noncitizen voters will increase the power of working class and minority voters.²⁰⁴ Working class and minority voters share many of the same political concerns as immigrant voters, including views on tax policy, cuts to public education, affordable health care, and anti-discrimination laws.²⁰⁵ If noncitizens are able to vote, they can align themselves with working class and minority voters to exert significant political pressure on candidates and influence the outcome of close elections.²⁰⁶ California politics suggests that politicians will quickly adapt their campaign strategies to accommodate noncitizen voters, just as they have done to include recent immigrants from Asia and Latin America who have been naturalized and become eligible to vote.²⁰⁷

This argument for noncitizen voting is a delicate one which should be directed at only an extremely targeted audience who will view their own political interests as in line with the interests of noncitizens. Certainly some moderate liberal voters hesitate to add to the potential power of working class and minority voters. For these voters, and for conservative voters, advocates of noncitizen voting might instead point out that the voting behavior of immigrant groups is difficult to predict and that 40% of Latino voters actually voted with the Republican Party in the 2003 California recall election.²⁰⁸

204. Hayduk, *supra* note 1, at 10.

205. *Id.*

206. *Id.* at 10 n.18 (citing the 2000 presidential election as well as various New York elections as examples of close elections). For example, Michael Bloomberg defeated Mark Green by 40,000 votes out of 1.5 million votes cast. Over 1.5 million New Yorkers today are noncitizens (18%), representing a significant potential voting bloc in city elections. *Id.* Another example of a close election in which noncitizen voters would have had the potential to influence the outcome is the recent December 2003 mayoral race in San Francisco, where Matt Gonzalez, a candidate with widespread support within the immigrant community, lost by only three percentage points. See City and County of San Francisco Department of Elections, *supra* note 7.

207. In the 2003 gubernatorial recall election, for example, Governor Gray Davis tried to garner support from immigrant voters by signing a bill into law that allowed noncitizens to obtain driver's licenses, despite his own previous opposition to the bill. His opponents, Arnold Schwarzenegger and Cruz Bustamante stressed their immigrant roots. See Jim Provance, *California Recall: Lt. Gov. Cruz Bustamante Addresses Funds*, PITTSBURGH POST-GAZETTE, Sept. 8, 2003, <http://www.post-gazette.com/pg/03251/219336.stm> (last modified Oct. 4, 2004).

208. Edwin Garcia, *Latino Vote Pleases GOP*, SAN JOSE MERCURY NEWS, Oct. 10, 2003, at 9A.

B. *Winning Over the Conservative Voter*

In the movement for noncitizen voting rights, appeals to the liberal electorate have succeeded by educating voters about the history of noncitizen voting, its practice in other countries around the world, and the moral and political arguments in its favor. However, such tactics are unlikely to sway voters who view immigrants as a drain on the nation's resources and seek to reduce, rather than expand, rights and benefits for immigrants.²⁰⁹ For these voters, the issue of noncitizen voting must be approached gradually, starting with a movement to extend the franchise in school elections. These voters, who might not be persuaded by moral arguments, may come to accept the idea of noncitizen voting when the debate is framed in terms of 1) increasing the educational achievement of the children of immigrants, who are likely U.S. citizens themselves and 2) increasing individual parents' autonomy and choice over their children's education, a central premise of the largely conservative school voucher movement. In addition to a public policy argument, advocates of noncitizen voting can appropriate conservatives' own arguments about the need for immigrants to assimilate to win support for noncitizen voting. Finally, supporters of noncitizen voting can propose the formation of a political coalition with conservatives to support the passage of a constitutional amendment permitting foreign-born citizens to become president, while also pushing enfranchisement for noncitizens at the local level. Developing a different set of arguments designed to sway the conservative voter is an important political strategy if the movement for noncitizen voting rights is ever to spread beyond anomalous, heavily Democratic communities.

I. *The Educational Policy Argument*

In taking a gradual approach to the enfranchisement of noncitizens, schools offer a natural starting point. First, the immigrant population has a disproportional stake in the nation's public schools, because they tend to have disproportionately young families with school-age children, and because they typically cannot afford to attend private schools. Second, courts agree that the children of immigrants, even illegal ones, are just as deserving of a free public education as the children of citizens. As a result, it is not a huge stretch of the political imagination to say that noncitizen parents should be able to participate in public school elections. Finally, school board elections are generally apolitical and nonpartisan; election outcomes tend not to affect the balance of power among political parties.²¹⁰ Thus, expanding the electorate to include noncitizens may seem less threatening in school board elections, in contrast to other local elections.

209. LAKOFF, *supra* note 161, at 187-89.

210. FREDERICK M. HESS, NATIONAL SCHOOL BOARDS ASSOCIATION, SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY 5, 33 (2002).

The Supreme Court has recognized that the education of all children, including illegal immigrant children, is an important national concern. In its landmark 1982 decision *Plyler v. Doe*, the Court held that Texas's denial of a free public education to the children of illegal immigrants constituted a violation of the Equal Protection Clause.²¹¹ In *Plyler*, the Court recognized that while education is not a fundamental right guaranteed by the Constitution, it nevertheless required "special constitutional sensitivity."²¹²

Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction [between "right" and mere "benefit"]. . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.²¹³

Thus, Supreme Court precedent preempts any argument by conservatives that noncitizen children should not even be allowed to attend public schools and that the issue of their parents' participation in school elections is moot.

The Court has also recognized that all community members have an interest in school board elections. In *Kramer v. Union Free School District No. 15*, the Court struck down a New York law that restricted the right to vote in school district elections to parents of children enrolled in the district's schools and to property owners.²¹⁴ The Court recognized that "[a]ll members of the community have an interest in the quality and structure of public education,"²¹⁵ though it is the parents of children in school who have a "direct" stake in school affairs.²¹⁶ Extending *Kramer*, then, tax-paying noncitizen parents certainly have as much of a direct stake in school affairs as citizens, like the plaintiff in *Kramer*, without school-age children who do not pay property taxes.

In presenting the case for noncitizen voting to conservative America, advocates might do better emphasizing that noncitizen parents' political participation will have a positive impact on their children's education, rather than pointing to relevant Supreme Court rulings. It is widely accepted in the field of education that increased parental participation in schools has a positive effect on children's educational achievement. The

211. 457 U.S. 202 (1982).

212. *Id.* at 226.

213. *Id.* at 221.

214. 395 U.S. 621 (1969).

215. *Id.* at 630.

216. *Id.* at 632.

Southwest Educational Development Laboratory (SEDL), one of nine regional research labs funded by the U.S. Department of Education, has found that “[w]hen schools, families, and community groups work together to support learning, children tend to do better in school, stay in school longer, and like school more.”²¹⁷ In its recent report synthesizing research on parent involvement over the past decade, SEDL concludes that regardless of family income or background,

students with involved parents . . . were more likely to earn higher grades and test scores, and enroll in higher-level programs; be promoted, pass their classes, and earn credits; attend school regularly; have better social skills, show improved behavior, and adapt well to school; graduate and go on to postsecondary education.²¹⁸

Whether parents get involved by helping children with their homework or voting in school elections, parents who take an active role in their children’s education are likely to feel invested in their child’s academic success and to convey a sense of encouragement and support to that child.

Sociologist Pedro Noguera has argued that political strategies, rather than educational strategies alone, are necessary to reduce the achievement gap between affluent white students and poor minority students.²¹⁹ Based on a four-year case study at Berkeley High School in Berkeley, California, Noguera demonstrates that even in a politically progressive community such as Berkeley, affluent white parents view education reform as a zero-sum game (increasing educational equity for low-performing minority students means reducing opportunities for high-performing white students) and put up powerful political resistance. To bring about institutional changes, minority parents must have enough political power to counter white parents.²²⁰ Noguera’s study further showed that only after minority parents were able to form an organized constituency were they able to pressure the school administration to provide significant curricular changes benefiting minority students.²²¹

As Noguera’s and others’ research suggests, one way to meaningfully integrate parents into a school’s programs and community is to include

217. ANNE T. HENDERSON & KAREN L. MAPP, NATIONAL CENTER FOR FAMILY & COMMUNITY CONNECTIONS WITH SCHOOLS, SOUTHWEST EDUCATIONAL DEVELOPMENTAL LABORATORY, *A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT* 7 (2002).

218. *Id.*

219. Pedro A. Noguera, *Racial Politics and the Elusive Quest for Excellence and Equity in Education*, 34 *EDUC. & URB. SOC’Y* 18, 19 (2001).

220. *Id.*

221. *Id.*

parents as participants in important school decisions,²²² one clear way being participation in the election of school board members. This idea is not wholly novel. The Supreme Court of Vermont, in an 1863 decision affirming noncitizens' right to vote for and serve as local school committee members, noted that allowing parents to vote in school board elections would have a positive effect on their children's education.

It is of the greatest importance that the children of such persons should be educated, at least to the extent for which opportunity is afforded by our common schools, and that the parents should be induced to send their children to school, and it seems to us that they would be much more likely to do so, and to take interest in their attendance and improvement, if allowed to participate in their regulation and management, than if wholly excluded.²²³

Following this logic, some communities have expanded the franchise by permitting noncitizen parents to vote in local school elections. From 1970 to 2002, during the period of decentralized school governance, New York allowed all parents of public school children, citizen or not and legal or illegal, to vote in its thirty-two local school board elections. In Chicago, noncitizens can vote in elections for the city's 550 local school councils, though these councils act more as individual school advisory councils with less significant decision-making power.²²⁴

Despite the size of the New York City public school system, there have been no significant studies on the effects of the city's choice to enfranchise noncitizens. However, anecdotal evidence suggests that the enfranchisement of noncitizen parents allowed them to pressure the school district and resulted in educational improvements for their children. According to Guillermo Linares, a local school board member in District Six who later became the first Dominican-American elected to higher office in the United States as a member of the New York City Council, pressure from parent voters led to a 1989 commitment from Mayor Koch, who was up for reelection at the time, to give \$300 million to District Six to build eight new schools.²²⁵ At the time, District Six was the most overcrowded in the entire city, and parent voters had made the construction of

222. Ron Skinner, *Parent Involvement*, EDUC. WEEK, available at <http://www.edweek.org/context/topics/issuespage.cfm?id=12> (last modified Sept. 15, 2004) (citing J.L. EPSTEIN, SCHOOL, FAMILY, AND COMMUNITY PARTNERSHIPS: PREPARING EDUCATORS AND IMPROVING SCHOOLS 43-44 (2001)).

223. Raskin, *supra* note 40, at 1455 (citing *Woodcock v. Bolster*, 35 Vt. 632, 641 (1863)).

224. According to the Chicago Public Schools website, at <http://www.cps.k12.il.us/> (last visited Sept. 6, 2004), local school councils (LSCs) are the site-management team of each school, consisting of the principal, six parent representatives, two community representatives, two teacher representatives, and one student representative (at the high school level). The LSC is responsible for selecting the school's principal, renewing the principal's contract, approving the School Improvement Plan, and approving the school's budget.

225. Email correspondence with Guillermo Linares (Dec. 1, 2003) (on file with author).

new schools their top political priority.²²⁶ In 1992, 56,000 noncitizens were registered as parent voters, suggesting that this largely noncitizen voting pool exercised significant potential power in obtaining this funding.²²⁷

Research conducted about the effects of minority representation on local school boards also suggests that when noncitizen parents are able to secure representation of their distinct interests, their children will benefit. For example, studies have found that minority representation on local school boards correlates with higher numbers of minorities in administrative and teaching positions.²²⁸ This may be because school boards hire the school superintendent and often weigh in on district hiring policies.²²⁹ Higher numbers of minorities in teaching positions, in turn, correlate with improved educational outcomes for minority students. For example, one study found that the percentage of Hispanic teachers had a significant positive effect on Hispanic students' college attendance and a negative effect on their dropout rates.²³⁰ Another study found that Black and Hispanic students in districts with higher proportions of Black and Hispanic teachers perform better on standardized exit exams and have a higher pass ratio on the test in comparison to Anglos than do Black and Hispanic students in districts where there are fewer teachers of their own racial and ethnic background.²³¹ Though the effect of minority school board representation on student achievement is indirect, there is evidence that the effect is nevertheless significant. This indicates that if noncitizens are able to vote in school board elections and secure descriptive representation on school boards, their children are likely to obtain educational benefits.

The Berkeley and New York City examples of the effects of previously excluded parent groups gaining political power may suggest that this type of political organizing is exactly what conservatives will resist. Noncitizen parents may have different educational concerns for their children than conservative voters. If noncitizens are able to influence the school decision-making process, and one assumes that the division of educational resources is a zero sum game, then increasing services for the children of noncitizens may mean reducing services for the children of affluent conservatives. One response to this concern is that in large urban centers where the noncitizen population is significant, the children of affluent

226. *Id.*

227. Harper-Ho, *supra* note 71, at 319.

228. Joseph Stewart, Jr. et al., *Black Representation in Urban School Districts: From School Board to Office to Classroom*, 42 W. POL. Q. 287, 287-305 (1989); see also Luis Ricardo Fraga et al., *Hispanic Americans and Educational Policy: Limits to Equal Access*, 48 JOURNAL OF POLITICS 850, 850-76 (1986).

229. Stewart, *supra* note 228, at 287-305; Fraga, *supra* note 228, at 850-76.

230. Fraga, *supra* note 228.

231. Melissa J. Marschall, *Minority Representation and Local School Boards* 19 (2003) (paper prepared for the conference "School Board Politics," Kennedy School of Government, Harvard University) (on file with author).

conservatives often attend private school. Thus, their children will not be affected by any school decisions influenced by noncitizen parents, although their property values might be.

More importantly, when the movement for noncitizen voting rights is framed in terms of a claim that individual noncitizen parents should have a say over their child's education, conservatives will undermine their other educational agendas by rejecting such an argument. A major part of the Republican education platform, in addition to the push for educational standards and high-stakes testing, has been the movement towards school choice, educational vouchers, and charter schools.²³² Conservatives and libertarians argue that American public schools are too large, too bureaucratic, too inefficient, and too unresponsive to parents.²³³ In its place, they propose a system of school choice, whereby parents could choose to send their children to any number of different public charter schools or to a private school with an educational voucher. Given *Plyler*, conservatives cannot argue that the children of noncitizen parents are not entitled to a public education. Assuming, then, that all children deserve a free public education, and that parents should have a say over what their child's education entails, it would be quite inconsistent for conservatives to argue that citizen parents deserve a say over their children's education, but noncitizen parents do not.

2. *The Assimilation Argument*

Another important argument for noncitizen voting is that it educates noncitizens about our democratic system and accelerates their assimilation into American society.²³⁴ Assimilation is an idea that currently holds significant political appeal these days, especially among conservative voters. Witness, for example, the passage of Proposition 227 in California in 1998, which eliminated bilingual education, and the support for Proposition 54 in California in 2003, which would have eliminated racial classifications used

232. See, e.g., Republican Platform 2000, at <http://www.cnn.com/ELECTION/2000/conventions/republican/features/platform.00/#14> (last visited Oct. 4, 2004). The platform, entitled "Real Education Reform: Strengthening Accountability and Empowering Parents," calls for the federal government to "[e]xpand parental choice and encourage competition by providing parents with information on their child's school, increasing the number of charter schools, and expanding education savings accounts for use from kindergarten through college. . . . We advocate choice in education, not as an abstract theory, but as the surest way for families, especially low-income families, to free their youngsters from failing or dangerous schools and put them onto the road to opportunity and success." *Id.*

233. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS & AMERICA'S SCHOOLS* (1990) (arguing that America's failing public schools are products of their institutional settings and inherently bureaucratic, and presenting a reform proposal based on parental choice and market-driven reform).

234. See Raskin, *supra* note 40, at 1454 (discussing civic education rationale for noncitizen voting, as used by the Supreme Court of Vermont in *Woodcock v. Bolster*, 35 Vt. 632, 641 (1863)); Harper-Ho, *supra* note 71, at 297 (discussing civic education).

by state and local government.²³⁵ Conservatives are, therefore, likely to support noncitizen voting if they see it as a means of hastening the process of assimilation and naturalization.

Of course, critics of noncitizen voting may argue that voting is a right that must be earned through the process of naturalization and acquiring citizenship. However, noncitizen voting rights are more properly viewed as a “pathway to citizenship, not a substitute” for it,²³⁶ as most noncitizens already intend to become citizens as quickly as the U.S. government will permit them to do so.²³⁷ Indeed, citizenship is the only means for noncitizens, including Green-Card holders, to achieve total security from deportation. Unfortunately, the process of obtaining citizenship is a lengthy one for most immigrants to the United States. It takes on average twelve months for U.S. Citizenship and Immigration Services (USCIS) to process a naturalization application, which is available only to those who have been LPRs for five years and can meet the other requirements.²³⁸ In addition, the number of noncitizens who can acquire LPR status is subject to strict quotas, such that even noncitizens who are eligible to enter the United States with LPR status as a close relative of a U.S. citizen, for example, must endure up to a twenty-year wait.²³⁹ USCIS reports that average application processing times, nationally, increased significantly during fiscal year 2003, thus making the process even more lengthy and arduous.²⁴⁰

The argument that voting rights for noncitizens is an important step towards citizenship and accelerates the process of assimilation is one that was prominent in early instances of noncitizen voting. For example, in the same decision affirming noncitizens’ right to vote for and serve as local school committee members, the Supreme Court of Vermont supported the state’s policy on the ground that it was wise

235. For a discussion of recent California ballot propositions, see *supra* Part II.B.2.

236. Hayduk, *supra* note 1, at 12.

237. *Id.*

238. U.S. Dept. of Justice, U.S. Citizenship and Immigration Services, Adjudications Update—Second Quarter, FY 2000, available at <http://uscis.gov/graphics/publicaffairs/backgrounds/Natz.htm> (May 26, 2000).

239. See *Immigrant Numbers for June 2003*, VISA BULLETIN (U.S. Dept. of State), May 2003, <http://www.immigration.com/newsletter/2003-06.html> (last modified Oct. 4, 2004).

240. See Massachusetts Immigrant & Refugee Advocacy Coalition, DHS One Year Later: Immigrant Services Get Failing Grades, available at http://www.miracoalition.org/USCIS_Report_Card.htm (last visited Sept. 6, 2004). I-485 adjustment-of-status processing times increased from thirteen months in FY 2002 to thirty-three months in FY 2003. Processing times for I-130 family-based petitions increased from twenty-five months in FY 2002 to fifty-one months in FY 2003. N-400 naturalization processing times rose from ten months in FY 2002 to fourteen months in FY 2003. I-90 applications to replace Green Cards took nine months to process in FY 2002 but nineteen months in FY 2003. The backlog in adjustment-of-status applications stands at an all-time high, with more than 1,242,783 cases pending as of December 31, 2003 (compared with 966,472 pending cases at the end of FY 2002).

to extend to such emigrants all the rights of citizenship, that their feelings and interests may become identified with the government and the country. While awaiting the time when they are to become entitled to the full rights of citizenship, it seems to us a wise policy in the Legislature to allow them to participate in the affairs of these minor municipal corporations, as in some degree a preparatory fitting and training for the exercise of more important and extensive rights and duties of citizens.²⁴¹

Particularly given that so many recent immigrants, especially those from Asia and Latin America, come from countries that are non-democratic and have little experience with governments that welcome their input into the decision-making process, it serves the national interests for these noncitizens to feel welcomed into our political system and to become educated participants in our democracy even while they are on the long road to gaining citizenship.

3. *The Coalition Argument*

Recent events in California politics provide another strong argument for convincing conservatives that supporting noncitizen voting in local school elections is in their best interest. Republican leaders, such as Senator Orrin Hatch, have hopes that Governor Schwarzenegger might one day be a viable presidential candidate, and a movement has begun to amend the United States Constitution to permit a naturalized citizen to become President.²⁴²

Many of the normative arguments for noncitizen voting also extend to permitting foreign-born citizens to hold the highest political office in the United States.²⁴³ In the words of Governor Schwarzenegger,

There are so many people in this country that are now from overseas, that are immigrants, that are doing such a terrific job with their work, bringing businesses here, that there's no reason why not [to allow them to be President]. The key thing is you understand the political system and how it works.²⁴⁴

Advocates of noncitizen voting can approach conservatives on this issue by proposing the formation of a powerful political coalition to support both the enfranchisement of noncitizens in local school elections as well as an

241. Raskin, *supra* note 40, at 1454 (citing *Woodcock v. Bolster*, 35 Vt. 632, 640-41 (1863)).

242. See John M. Broder, *Schwarzenegger Backs Amendment to Allow Immigrant Presidents*, N.Y. TIMES, Feb. 23, 2004, at 14 (discussing proposed amendment to the United States Constitution, introduced by Senator Hatch); see also U.S. CONST. art. II, § 1, cl. 5.

243. See, e.g., Akhil Reed Amar, *Natural Born Killjoy: Why the Constitution Won't Let Immigrants Run For President, and Why That Should Change*, LEGAL AFFAIRS, Mar./Apr. 2004, http://www.legalaffairs.org/issues/March-April-2004/argument_amar_marpar04.html (last visited Oct. 4, 2004).

244. Broder, *supra* note 242, at 14 (quoting Governor Schwarzenegger).

amendment to the Constitution to permit political participation by foreign-born citizens in the office of President.

C. *Anticipating Objections*

In addition to proactively framing the debate about noncitizen voting with an eye towards both liberal and conservative voters, advocates must anticipate the inevitable objections to noncitizen voting and be prepared to counter them. Many of these objections have been highlighted in press coverage of the New York City Council's recent proposal to permit non-citizens to vote in municipal elections, which has been opposed by Republican Mayor Bloomberg, as well as the *New York Times* Editorial Board.²⁴⁵ As the San Francisco proposal moves forward, it is likely to generate a similar torrent of criticism to which advocates of noncitizen voting must be prepared to respond. Legal scholars and political scientists have done a thorough job analyzing likely arguments against noncitizen voting,²⁴⁶ and thus I will provide only a brief summary of the most common objections, as well as possible rebuttals.

1. *Noncitizens Are Not Being Denied the Right to Vote. They Just Have to Naturalize First.*

According to Mayor Bloomberg, "If you want to have full rights, and voting is a very big part of full rights, become a citizen."²⁴⁷ However, as discussed in Part III.B.2, noncitizens face numerous obstacles as they navigate the process of naturalizing and obtaining citizenship. For many, the wait to obtain LPR status and subsequent naturalization can be over twenty years. These would-be citizens should not be shut out of participating in the political process in the community where they reside during this long wait, considering that this wait may span the entirety of their child's primary and secondary educations.

2. *"Citizenship" Loses Its Meaning If Noncitizens Are Allowed to Vote.*

Mark Krikorian, Executive Director of the Center for Immigration Studies, a Washington group that favors greater restrictions on immigration, argues that "[e]xtending voting rights to noncitizens eliminates the last distinction between people who have accepted permanent membership

245. See *A Citizen's Right*, N.Y. TIMES, Apr. 19, 2004, at A22; Kim Cobb, *Immigrants' Voting Rights Becoming a Major Issue*, HOUSTON CHRON., Apr. 19, 2004, at A1; Alexandra Marks, *Should Noncitizens Vote?*, CHRISTIAN SCI. MONITOR, Apr. 27, 2004, at 1; Benjamin Smith, *Ferrer Seizes Upon Idea to Permit Aliens a Vote in Municipal Elections*, N.Y. SUN, Sept. 25, 2003, at 1; Robert F. Worth, *Push Is On to Give Legal Immigrants a Vote in the City*, N.Y. TIMES, Apr. 8, 2004, at A1.

246. See, e.g., Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L. & POL'Y 403, 426-39 (2002); Harper-Ho, *supra* note 71, at 298-305; Hayduk, *supra* note 1, at 11-16; Raskin, *supra* note 40, at 1145-53.

247. Marks, *supra* note 245.

in the American people and those who have not."²⁴⁸ However, there are many other factors more important than voting that distinguish a citizen from a noncitizen in the United States. For example, a noncitizen, including a Green-Card holder, can be deported from the United States, while a citizen can never be exiled from his own country. A noncitizen, including a Green-Card holder, cannot freely travel outside of the United States to visit friends and family without risking his ability to reenter.

In the wake of September 11th, over 700 noncitizens were detained by INS for an average of eighty days and subjected to verbal and physical abuse until they were cleared by the FBI of any connection to wrongdoing and released.²⁴⁹ A citizen is protected from this level of governmental tyranny whereas noncitizens are not because citizens enjoy greater due process rights under the United States Constitution.

Citizenship in the United States means liberty, not just the right to vote. Citizenship and voting rights can be further disaggregated when one recognizes that there are many citizens who do not have the right to vote, including children and many felons. Just because a noncitizen can vote in local elections does not mean that person is any less subject to the will of the United States government. Thus, there are many factors outside of voting that distinguish citizens from noncitizens, and many reasons why noncitizens will still have a strong incentive to naturalize even if they are permitted to vote in local elections.

3. *Noncitizens Do Not Have a Stake in the Community, So They Should Not Have the Right to Vote. Their Loyalty Is Questionable.*

While it is true that some immigrants intend to live in United States only temporarily, many are here because they hope to start a new life in the United States and one day obtain citizenship. Some, such as refugees and political asylees, can never return to their home country even if they wanted to. Thus, it is inaccurate to say that noncitizens do not have a stake in the United States. Even without the right to vote, noncitizens have formed important connections in their local communities: in churches, in local businesses and community organizations, on local sports teams, and in schools. Even those here on temporary work or student visas are usually here for a period of years, long enough to form ties with their local professional or academic community.

Some argue that the loyalty of noncitizens lies first with their sending country, and only second with the United States. According to the *New York Times* Editorial Board, "[e]xtending the most important benefits of citizenship to those who still hold their first allegiance to another country

248. Worth, *supra* note 245, at A1.

249. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1235-38 (5th ed. 2003).

seems counterproductive.²⁵⁰ This contention is easily refutable, however, because in choosing to leave their original home countries and immigrate to the United States, noncitizens have demonstrated their commitment to this country by acting with their feet in a more substantial way than most citizens ever do. In addition, matters of foreign policy having to do with their sending country are not decided in local elections. In local elections, voters decide issues that will have a direct impact on their local communities, and noncitizen residents of a local community have a stake in the outcomes of these elections just as citizens do. On this issue, we can learn from the experiences of the many European countries, and others around the world, which already permit noncitizens to vote without questioning their loyalty.

4. *Enfranchising Noncitizens Will Reward and Increase Illegal Immigration.*

It is ridiculous to think that noncitizens will come to the United States because they can vote in local elections here, or that they will decide not to immigrate because they will not be allowed to vote here. Immigrants come to the United States for a variety of reasons: to work, study, escape persecution at home, and reunite with family members. The right to vote is unlikely to factor heavily into this calculus.

Moreover, it is extremely unlikely that, even if they are extended the right to vote in local elections, undocumented immigrants will take advantage of this opportunity. Undocumented immigrants will fear giving their information to any government official, including the Registrar of Voters, as the right to vote in local elections will in no way protect them from deportation.

5. *Allowing Noncitizens to Vote Will Be Too Difficult Logistically and Will Lead to an Increase in Voter Fraud.*

Evidence from the few localities which have allowed noncitizens to vote suggests that the practice is easily administered, and that worries about logistics are misplaced. For example, in Takoma Park, Maryland, where legal and undocumented immigrants are allowed to vote in local elections, the registrar of voters keeps two separate voter lists: one for citizens and noncitizens who vote in local elections, and one for citizens only who vote in state and national elections.²⁵¹ In New York City (until the local school boards were dismantled), parents filled out a blue voter's application with their name and their child's name, date of birth, and school.²⁵² The voter registration form was then checked against the school roster for

250. *A Citizen's Right*, *supra* note 245, at A22.

251. Hayduk, *supra* note 1, at 15-16.

252. Carlsen, *supra* note 18.

accuracy.²⁵³ School board elections were held in May, apart from general elections, so there was no confusion about identifying noncitizen voters at the polls.²⁵⁴ In Cambridge, Massachusetts, the Elections Commission and City Council have approved a plan whereby the list of noncitizen voters would be drawn up based on data from the city's annual census, which has a box indicating citizenship status. Voters will still have to register to vote and confirm their residence by returning a confirmation form sent by the Elections Commission.²⁵⁵

For those communities that may choose to enfranchise only documented immigrants, there is a fear that undocumented immigrants will mistakenly be allowed to vote. For example, the Cambridge plan does not permit undocumented immigrants to vote, yet they might become registered anyway if they complete the census form. However, it is highly unlikely that undocumented immigrants will fill out any government form, such as a census form or voter registration card, that might indicate their illegal presence here in the United States. Those systems that currently permit undocumented noncitizens to vote have seen very little participation from this particular immigrant group because they fear making their presence known. In Takoma Park, for example, only 2.8% of registered noncitizens voted in the last election.²⁵⁶ In Chicago, school board officials expected an increase of 10 to 15% in Hispanic parent involvement in the local school council elections once noncitizen parents were allowed to vote, but instead participation increased by only 3%, despite that the extension of voting rights was widely publicized on radio and television.²⁵⁷ Juan Cruz, the vice-president of the Chicago Board of Education attributed the low participation to fear of the INS.²⁵⁸

It is true that a system that allowed only LPRs to vote might present difficulties, as it would be a complex task for election clerks to distinguish between the many different types of legal immigrants. This concern suggests that municipalities should extend the vote to all noncitizens, recognizing that undocumented immigrants are highly unlikely to actually vote.

CONCLUSION

It will be interesting to watch the political debate over noncitizen voting rights unfold in San Francisco. Given the city's past experiences with the issue, it seems clear that even in the liberal stronghold of San

253. *Id.*

254. *Id.*

255. Hayduk, *supra* note 1, at 16.

256. Certification of Election Results, Takoma Park, Maryland, City Election, at <http://207.176.67.2/clerk/election/cert-results03.pdf> (Nov. 4, 2003).

257. Peter Schmidt, *S.F. Weighs Granting Noncitizens Vote in Board Elections*, EDUC. WEEK, Mar. 31, 1993, at 22.

258. *Id.*

Francisco, advocates of noncitizen voting rights must gain the support of a wide spectrum of voters, including at least some conservatives, to pass local legislation extending the franchise to noncitizens in local school board elections. As a result, leaders of the movement will need to carefully frame the political debate and target their message to the audience at hand.

For a liberal or progressive audience, the historical practice of noncitizen voting and its widespread practice in other democracies around the world may be enough to convince them that San Francisco, which prides itself on its left-leaning, rights-oriented reputation, should extend the franchise to noncitizens. In addition, educating liberal voters about the extent to which noncitizens are already integrated into our society will add force to the powerful moral arguments for noncitizen voting.

The task of convincing conservative voters will prove more difficult, but it is necessary to win at least some political support from conservatives if the movement for noncitizen voting rights is ever to gain momentum and more widespread support. To gain the support of conservatives, the issue of noncitizen voting must be narrowed to the very specific context of school elections, allowing conservatives to view this development as a small exception to the general citizenship qualification for voting. Conservatives may support this exception based on the educational policy argument that when noncitizen parents become involved in their children's education by voting in school elections, their involvement will lead to increased academic achievement for their children while simultaneously promoting the value of parental control over education. Moreover, noncitizen voting helps recent immigrants on the citizenship track assimilate into American society by becoming involved in democracy at the local level. Enfranchising noncitizens in local school elections may even further conservatives' own political agenda by increasing support for a constitutional amendment allowing naturalized citizens to become President. In the end, if conservatives can be convinced that noncitizen voting in local school elections is a good idea, the practice may pave the way for a future with even greater voting rights for noncitizens at the local level. At the same time, if San Franciscans choose to extend the right to vote to noncitizens in school board elections, there is a distinct possibility of backlash from conservative anti-immigrant groups whose power to harness public sentiment to pass statewide anti-immigrant initiatives has been proven.²⁵⁹

Without a doubt, noncitizen voting faces substantial political hurdles. It is an idea that is wholly new and quite radical to many Americans. Very few municipalities have even discussed enfranchising noncitizens, and only

259. For a discussion of recent California statewide ballot initiatives, see *supra* Part II.B.2.

a small handful has actually done so.²⁶⁰ Given this background, worries about the legal obstacles to the practice seem premature. Although there are strong legal arguments at both the federal and state levels upon which to uphold a community's decision to enfranchise noncitizens in local school elections, without broad-based political support from both liberals and conservatives, the movement for noncitizen voting rights will not succeed.

260. For a summary of the current status of noncitizen voting rights movements around the nation, see The Immigrant Voting Project website, at <http://www.immigrantvoting.org> (last modified Aug. 19, 2004).

